85-1419

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

NAEGELE OUTDOOR ADVERTISING COMPANY OF LOUISVILLE, A Division of Naegele, Inc. - - - Petitioner

versus

C. MIKE MOULTON, BILLY G. WELLMAN, and LOUIS J. HOLLENBACH - - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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100 pp

QUESTIONS PRESENTED FOR REVIEW

I. Is the Decision of the United States Court of Appeals for the Sixth Circuit in Conflict With Applicable Decisions From Other Courts of Appeals in That It Fails to Recognize a Corporation's Protected Liberty and Property Interests Under the Fourteenth Amendment Due Process Clause in Its Business Goodwill and in Its Corporate Documents?

II. Does the Decision of the United States Court of Appeals for the Sixth Circuit, Which Fails to Acknowledge the Protected Status Enjoyed by Those Accused of Campaign Finance Violations in Kentucky, Present an Important Question of Federal Constitutional Law Which Should be Resolved by This Court?

PARTIES TO THE PROCEEDING

Petitioner (Plaintiff-Appellee)	Naegele Outdoor Advertising Company of Louisville, A Division of Naegele, Inc.
Respondents (Defendants-Appellants)	C. Mike Moulton, Billy G. Wellman and Louis J. Hollenbach

*Since the filing of this litigation, Petitioner has been merged into Major Media Management Corporation. Major Media, an affiliate of N of California, Inc. is in turn owned by Naegele Company, Inc., whose ultimate parent is Carlson Companies, Inc.

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NAEGELE OUTDOOR ADVERTISING COMPANY OF LOUISVILLE, A Division of Naegele, Inc. - - - - - - - - - *Petitioner*

v.

C. MIKE MOULTON, ET AL. - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF JURISDICTION

On September 23, 1985, the United States Court of Appeals for the Sixth Circuit reversed the Order entered by the United States District Court for the Western District of Kentucky which had earlier granted Naegele Outdoor Advertising Company of Louisville ("Naegele") an injunction against Kentucky authorities' investigation of Naegele for alleged violations of Kentucky's campaign finance laws [Appendix p. 1a].

A petition for rehearing, filed with the Sixth Circuit, was denied on November 22, 1985 [Appendix p. 25a].

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

This case involves the following statutes which are set out verbatim in the Appendix p. 67a. Kentucky

Revised Statutes 121.025, 121.035, 121.140(2), and 121.990, along with Indiana Code § 3-4-3-3.

STATEMENT OF THE CASE

In Kentucky and several other states, Naegele rents commercial billboard advertising space to both local and national advertisers. On November 18, 1983, fourteen agents of the Federal Bureau of Investigation ("FBI") and five Kentucky State Police ("KSP") officers, including Respondent C. Mike Moulton ("Moulton"),[1] raided Naegele's corporate offices in Louisville, Kentucky. Numerous Naegele documents were seized by both the federal and state authorities. The purpose of the KSP involvement in the raid was to seize evidence allegedly establishing that Naegele had violated Kentucky's campaign finance laws during the 1983 political campaigns in Kentucky.

The predicate facts surrounding the state investigation of Naegele are as follows. In September 1983, the KSP received a complaint from an informant, William Tolliver ("Tolliver"), alleging that Naegele

[1]Paul W. Richwalsky, Jr. ("Richwalsky") became Commonwealth's Attorney in Jefferson County, Kentucky, after the Naegele raid and investigation and was earlier a Defendant in this action, while Respondent Billy G. Wellman ("Wellman") was Commissioner of the Kentucky State Police. The Hon. David L. Armstrong ("Armstrong"), now Attorney General of Kentucky, was the original named Defendant Commonwealth's Attorney. He was Commonwealth's Attorney for Jefferson County, Kentucky ("Louisville") during the planning and execution of the raid. Hon. Louis J. Hollenbach ("Hollenbach") is now Commonwealth's Attorney for Jefferson County and a Respondent herein.

was overcharging its customers for billboard advertising *and* that Naegele had reimbursed its employees for political contributions made by them individually to candidates for public office. Tolliver was a former Naegele employee who had been dismissed on May 5, 1983, for engaging in deceptive business practices. Specifically, Tolliver told the police that Naegele had reimbursed several of its employees for their individual contributions to the 1983 gubernatorial campaign of present Kentucky Governor Martha Layne Collins. Such corporate reimbursements, if actually made, would constitute a violation of Kentucky's election laws. *See,* Kentucky Revised Statutes ("KRS") 121.025-121.035. Such activity would only amount to criminal behavior if done "willfully." *See,* KRS 121.990 (as amended in 1980). The allegations of Naegele campaign violations contained no allegation of willfulness in the supporting affidavits. When Tolliver informed state authorities about alleged illegal campaign activities he had not been a Naegele employee for several months.

The KSP's investigation and massive search and seizure in November 1983 was historically unprecedented.[2] Accordingly, the raid received extensive media exposure in Kentucky and in other states in which Naegele does business, undoubtedly, in part, because it was a departure from past investigative prac-

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[2]The KSP stated purpose was to seize Naegele employees' expense vouchers which would prove that improper reimbursements had been made by Naegele for otherwise lawful political campaign contributions.

tice [*See, Carroll Hubbard for Governor Committee* v. *Kentucky Registry of Election Finance,* 477 F. Supp. 184 (W.D. Ky. 1979), *reversed,* No. 80-3106 (6th Cir. 1981), *on remand,* No. C79-0157-P(B) (W.D. Ky. December 23, 1982) [Appendix p. 61a]. Not surprisingly, the District Court for the Western District of Kentucky concluded and opined that "widespread publicity has made it obvious that the good name, reputation or honor of plaintiff is at stake because of the information that was obtained as a result of the issuance and execution of the search warrant" [Appendix p. 26a, 36a].[3]

On November 30, 1983, Naegele filed a Verified Complaint and Motions for Temporary Restraining Order and Preliminary Injunction against these Respondents seeking to enjoin them and state authorities generally from investigating Naegele for alleged violations of Kentucky's campaign finance laws until such time as the Kentucky Registry of Election Finance ("Registry") first conducted its investigation as required by KRS Chapter 121.[4] Count 1 of Naegele's Verified Complaint was predicated upon a violation of the due

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[3]Naegele's unrebutted evidence of damage to its business goodwill was set forth in the Verified Complaint at a couple of different points. *See,* Verified Complaint, 9, 11-12. Since the Respondents herein never filed an Answer to Naegele's Verified Complaint, or any opposing affidavits on this issue, no effort was made to rebut these allegations of damage to goodwill.

[4]KRS Chapter 121 sets forth the statutory scheme whereby those accused of campaign finance violations in Kentucky are entitled to certain protections, including the right to a closed hearing and, thus, an adjudication out of the public limelight in which this case was scrutinized. *See,* KRS 121.140(2).

process clause of the Fourteenth Amendment. Count 2 was predicated upon a denial of equal protection. Count 3 stated a cause of action under the civil rights statute, 42 U.C.S. §1983 [Appendix p. 40a].

The district court enjoined the KSP, by Order dated November 30, 1983, from investigating Naegele concerning alleged unlawful campaign contributions without resorting first to the statutory Registry procedures. Respondents then moved to dissolve the temporary restraining order and dismiss Naegele's Complaint. The district court denied Respondent's motion and issued its preliminary injunction on March 29, 1984, basing its decision on Naegele's due process claims [Appendix p. 38a].[5] Pursuant to the injunction order Respondents were ordered to return to Naegele the documents seized during the November 1983 search, while Naegele was instructed to retain for safekeeping all documents ordered returned to it in its files.

Respondents duly appealed to the United States Court of Appeals for the Sixth Circuit. On September 23, 1985, that Court reversed the decision of the district court and remanded the case for further proceedings. The Sixth Circuit found that the protections

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[5]Concerning the discriminatory enforcement argument, the district court noted that there was, at that point, no sufficient proof in the record of unequal treatment [Appendix p. 36a]. That claim was left for subsequent development by Naegele. This Court, however, can take note of the fact that in the *Carroll Hubbard* case (discussed *infra*) the KSP conducted an independent field investigation and turned the results over to the Registry. It stands unrebutted that the KSP had never before circumvented or ignored the Registry process.

provided in KRS Chapter 121 for those accused of campaign finance violations were not exclusive under Kentucky law, *i.e.*, all such cases need not go to the Registry initially. As a result, the Sixth Circuit reasoned, Respondents could properly investigate and prosecute Naegele for alleged election law violations under Kentucky law without first proceeding to the Registry where Naegele would have enjoyed the benefit of that elaborate statutory scheme under Kentucky law.

The Sixth Circuit then held that Naegele could not identify either cognizable liberty or property interests under the Fourteenth Amendment due process clause which had been damaged at the hands of state officials. According to the Sixth Circuit, Naegele could not prove it suffered damages of constitutional proportion as a result of state actions. Naegele's petition for rehearing was denied in due course without explanation.

REASONS FOR ALLOWANCE OF THE WRIT

This Court should review the decision of the United States Court of Appeals for the Sixth Circuit in the instant action and grant Naegele's petition for a writ of certiorari for the following reasons. First, the Sixth Circuit's ruling and reasoning are simply wrong as a matter of law and constitutional principle. The court erroneously failed to recognize Nagele's protected liberty and property interests under the Fourteenth Amendment due process clause. Naegele has presented substantial unrebutted proof of damage to business goodwill and First Amendment interests. Corporate

documents, *i.e.,* corporate *property* wrongfully seized during the November 1983 raid by the KSP, dealt with lawful and protected First Amendment activities. Those documents were returned expeditiously by the KSP, but not before the contents were made known to the press which "commented" on those lawful and constitutionally protected acts so as to place them in a "false light" of sinister or improper behavior. In truth, the documents evidenced proper business contacts and some were related to legitimate lobbying efforts. (The Court can take judicial notice that outdoor advertisers are regulated and sell political advertising.)

This damage to Naegele's identifiable liberty and property interests obviously constitutes *"reputation plus"* damage in violation of the Fourteenth Amendment due process clause, *i.e.,* damage to tangible liberty and property interests above and beyond mere reputation damage. Federal courts of appeals have routinely acknowledged this legal doctrine and applied it to allow compensation for those who suffer such damage at the hands of the state where the damage involves more than mere personal reputation, such as in *Paul* v. *Davis,* 424 U. S. 693 (1976).

Second, simple logic dictates that the safeguards embodied in KRS Chapter 121 place Naegele in some protected status under Kentucky law since these statutory protections were obviously crafted to protect *something.* Naegele submits they were created to guard against undue interference with the First

Amendment right to participate in the political process including, but not limited to, making monetary contributions individually to candidates. *See, Buckley* v. *Valeo,* 424 U. S. 1 (1976).

The determination of the legality of certain political expenditures is the *raison d'etre* of the Registry. Naegele's protected status was destroyed, and Naegele's due process rights were violated, when the state authorities conducted their massive search and investigation of Naegele with total disregard for the protections of KRS Chapter 121 and the Registry and with no attempt to show criminal intent, *i.e.*, willfullness. The Kentucky district court understood and correctly interpreted Kentucky law to require that all violations of the state's campaign finance laws should proceed first to the Registry. In part, the district court based its decision on precedent from a case which arose out of a prior gubernatorial campaign in Kentucky. *See, Carroll Hubbard for Governor Committee* v. *Kentucky Registry of Election Finance,* 477 F. Supp. 184 (W.D. Ky. 1979), *reversed,* No. 80-3106 (6th Cir. 1981), *on remand,* No. C79-0157-P(B) (W.D. Ky. December 23, 1982) [Appendix, p. 61a].

The Sixth Circuit erroneously overruled the district court's correct interpretation of the Kentucky statutes and in so doing sanctioned the illegal and unconstitutional state activity. The Sixth Circuit's denial of Naegele's claim generates an important question of federal constitutional law which should be settled by this Court; the First Amendment is always intertwined with restrictions on participation in the political pro-

cess such as those codified in KRS Chapter 121. Naegele has suffered irremediable damage of constitutional proportion as a result of the KSP's actions and the Sixth Circuit's subsequent erroneous interpretation of Kentucky campaign finance law. That decision must be set aside by this Court.

ARGUMENT

I. Naegele Suffered Damage to Cognizable Liberty and Property Interests Under the Fourteenth Amendment Due Process Clause and the Decision of the Sixth Circuit Refusing to Recognize That Injury is Inconsistent with Decisions from Other Courts of Appeals.

It is difficult to comprehend the Sixth Circuit's refusal to appreciate the fact that Naegele has suffered irreparable damage to liberty and property interests protected by the Fourteenth Amendment. The court's decision is inconsistent with both the reasoning and spirit of other recent Sixth Circuit decisions and is in conflict with decisions from other federal courts of appeals. For purposes of the Fourteenth Amendment due process analysis, the instant action is properly characterized as a "reputation *plus*" case. That terminology refers to those cases in which the party alleging a civil rights violation and damage to his due process rights alleges damage to protected interests *in addition to* any injury to mere personal reputation. In that way, those so damaged at the hands of the state can be compensated. This Court's decision in *Paul* v. *Davis,* 424 U. S. 693 (1976) simply does not control in a "reputation plus" case.

Prior to the Sixth Circuit's decision in the instant case, that court twice recently acknowledged that "reputation plus" injuries suffered at the hands of the state are cognizable under the Fourteenth Amendment due process clause. *See, Burkhart* v. *Randles,* 764 F. 2d 1196, 1201 (6th Cir. 1985); *Bacon* v. *Patera,* 772 F. 2d 259, 263-64 (6th Cir. 1985). In fact, in those two cases the Sixth Circuit went to considerable lengths to locate some identifiable interest which had been damaged. No such effort was made in the instant case despite unrebutted facts which had been found by the district court and which were virtually leaping from the record showing First, Fourth, and Fourteenth Amendment violations.

As noted, Naegele's damages as a result of the wrongful KSP investigation and search in November 1983 fall beyond the scope of the rule announced in *Paul* v. *Davis, supra.* Naegele unquestionably possesses protected interests in its business goodwill. Damage to that interest alone establishes "reputation *plus*" injuries.

Moreover, *Paul* v. *Davis* actually supports Naegele's legal position. The issue in *Paul* was whether defamation by police officers, standing alone and apart from any other state action, stated a claim for relief under the Fourteenth Amendment. This Court, however, rejected the proposition that reputation alone and "apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the due process clause." *See, Paul* v. *Davis, supra* at 701. The clear

implication of that decision is that when accompanied by more tangible interests (*i.e.*, when there is "reputation plus" damage), even damage to reputation can state a claim for relief under the Fourteenth Amendment. Damage to more tangible interests is present here.

There is no dispute that Naegele suffered a loss of business and damage to its business goodwill as a result of the wrongful search and seizure in November 1983. *See,* Verified Complaint, 9, 11-12; Appendix p. 40a. That proof was clearly set forth by Naegele and has never been rebutted since no Answer or opposing affidavits were ever filed. There can also be no question that Naegele's documents (expense vouchers) were seized during the KSP raid and those documents are obviously property under any reasonable definition of the term. The state authorities (Respondents herein) clearly damaged Naegele's property in violation of the Fourteenth Amendment due process clause.

The Sixth Circuit's decision in this case is inconsistent with *Marrero* v. *City of Hialeah,* 625 F. 2d 499 (5th Cir. 1980), *cert. denied,* 450 U. S. 913 (1981). In that case, the Fifth Circuit distinguished this Court's decision in *Paul* v. *Davis, supra,* and held that *business goodwill,* as opposed to *personal reputation,* is a recognized property interest which, therefore, leads ineluctably to the conclusion that it constitutes "property" for purposes of the Fourteenth Amendment due process clause.

The Fifth Circuit in *Marrero* explained the rule of law which, if properly applied in the instant case, would have necessitated a ruling that Naegele suffered cognizable "reputation *plus*" damage under the due process clause. Succinctly stated:

> [o]ne's business, aside from the investment of money and tangible property therein, is in every sense of the word property, and, as such, if lawful, entitled to protection from all unlawful interference.

Marrero v. *City of Hialeah,* 625 F. 2d at 514; *see also, United States* v. *Tropiano,* 418 F. 2d 1069, 1076 (2d Cir. 1969), *cert. denied,* 397 U. S. 1021 (1970). That same conclusion is mandated by the common law of Kentucky which recognizes that business goodwill is a property right. *See, Proctor* v. *Allen,* 217 Ky. 180, 289 S. W. 300 (1925); *Potter* v. *Colvin,* Ky., 302 S. W. 2d 105, 108 (1957).[6] Naegele did not enjoy the protection from unlawful interference which the *Marrero* v. *City of Hialeah* decision promises. Instead, Naegele suffered damage to its business goodwill and had its business documents seized in violation of the Fourteenth Amendment and *prima facie* in violation of the

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[6]The *Marrero* decision also acknowledges that injury to reputation *plus* a violation of Fourth Amendment rights impinges upon protected interests under the due process clause. *Marrero* v. *City of Hialeah,* 625 F.2d at 514; *Emory* v. *Peeler,* 756 F.2d 1547, 1554 (11th Cir. 1985). Those Fourth Amendment violations are present since they have been incorporated in Naegele's case against these Respondents from the very start of the case. *See,* Verified Complaint, 6, 8-11.

Fourth Amendment since the required Registry process was not followed.

This is not merely an action for defamation brought by a party who has suffered "mere" embarrassment in the community due to a lawful investigation. Instead, this case involves unrebutted serious damage to Naegele's business reputation and seizure of Naegele business property, both involving damage to cognizable property rights under common law arising from unlawful state action. *Paul* v. *Davis* and the line of cases establishing the doctrine of "reputation plus" damage clearly sustain the position of Naegele — Naegele has stated a claim for relief against Respondents. The Sixth Circuit decision in the instant case is clearly at odds with this apposite line of federal decisions and state law. Therefore, the decision is clearly erroneous as a matter of law.

II. The Decision of the Sixth Circuit Failed to Acknowledge the Protected Status Enjoyed by Those Accused of Campaign Finance Violations in Kentucky and It Presents an Important Question of Federal Constitutional Law Which Should Be Resolved by This Court.

The Registry must have exclusive jurisdiction to investigate initially alleged unlawful campaign contributions in Kentucky or else the entire enforcement scheme collapses and patently violates equal protection principles. The language of KRS Chapter 121 and the decision in *Carroll Hubbard for Governor Committee* v. *Kentucky Registry of Election Finance,* 477 F. Supp. 184 (W.D. Ky. 1979), *reversed,* No. 80-3106 (6th Cir. 1981), *on remand,* No. C79-0157-P(B) (W.D. Ky.

1982), both irrefutably support the position of Naegele that jurisdiction rests exclusively in the Registry to conduct the initial investigation of alleged unlawful campaign contributions in Kentucky. There is no case in Kentucky holding differently. The district court's decision in favor of Naegele on this point was fully supported by that court's prior decision, on remand, in the *Carroll Hubbard* case. In sum, the Sixth Circuit incorrectly overruled a prior correct decision on the point.

In the *Carroll Hubbard* decision, a United States Representative and candidate for governor of Kentucky in the 1979 Democratic primary was alleged to have violated those portions of KRS Chapter 121 which prohibit a candidate from accepting cash contributions in excess of One Hundred Dollars ($100.00). No hearing was held before the Registry and, on remand, the criminal proceedings against candidate Carroll Hubbard were enjoined until such a due process hearing could be held by the Registry. The crux of the *Carroll Hubbard* decision was that substantial investigatory proceedings outside the scope of the Registry are unlawful and adherence to the rights guaranteed by KRS Chapter 121 is thus constitutionally required.

Based upon the *Carroll Hubbard* decision and its reading of KRS Chapter 121, the district court's decision in the instant case granting Naegele such an injunction was proper and the Sixth Circuit erroneously reversed that determination and thus denied Naegele the right to its due process hearing. The Kentucky district court was presumably more familiar

with Kentucky law as it relates to campaign finance violations, KRS Chapter 121, and proceedings before the Registry, than was the court of appeals. The district court's interpretation of the relevant Kentucky law, therefore, should have been respected and the Respondents herein duly enjoined from prosecuting and investigating Naegele outside the Registry framework.

The KSP seizure of Naegele business records allegedly containing evidence of alleged corporate reimbursement for individual political contributions along with records of lawful business and political acts provides an additional constitutional dimension that virtually compels review by this Court. Kentucky's campaign finance laws, embodied in KRS Chapter 121, are thoroughly rooted in the First Amendment protection for political contributions. As a result of that First Amendment implication, seizures of such protected speech material must be crafted with "scrupulous exactitude." *See, Zurcher* v. *Stanford Daily,* 436 U. S. 547, 564 (1978). It is indisputably true that if the Kentucky authorities had followed Kentucky law (and even they must admit they *could* have) no violation of the *Zurcher* rule would have occurred. In light of the conceded fact that protected materials were seized illegally because of warrant vagueness and in violation of legislatively conferred due process rights, this Court should, on that basis alone, vacate the Sixth Circuit opinion.

Activities in the political arena are, though subject to legitimate regulation, protected activity even when the political "speech" takes the form of campaign fi-

nance activities. *See, Buckley* v. *Valeo,* 424 U. S. 1, 16-17 (1976). If a corporation, by reimbursing otherwise legal contributions to a campaign, oversteps its proper bounds and commits campaign finance violations (a point that is debatable and unsettled in Kentucky) it has definitely not committed an act *malum in se,* but merely one *malum prohibitum* at the very most. That is, the activity (indirect corporate political contributions) does not involve moral turpitude and is, in fact, permitted in some states. *See, e.g.,* Indiana Code §3-4-3-3. When the Kentucky Legislature in 1980, in the wake of *Carroll Hubbard,* upgraded the elaborate protections of KRS Chapter 121 for those accused of violating these restrictions on political activity and injected the standard of willfulness (or clarified original intent), it was mindful of the technical nature of these violations and the inherent First Amendment implications and damage which could result from overblown, and possibly politically motivated, charges.

Normally, individuals accused of criminal violations are not afforded the type of elaborate procedures that Kentucky provides for alleged campaign finance violators. Kentucky has sagely recognized that such procedures are, however, an essential protection of First Amendment rights. The charge and prosecution of a Chapter 121 violation can do more damage than a conviction depending on the substance and timing. This case is living proof of that and even the Respondents must concede as much. In good faith they must also concede that the obvious care with which that statutory scheme was enacted reflects a legislative awareness

of the fundamental principle that *all* restraints and limitations on the exercise of First Amendment freedoms must pass the heightened standard of strict scrutiny. In the instant case, strict scrutiny means that the protections provided for under KRS Chapter 121 are not optional, to be discarded at the whim and caprice of the KSP and state authorities, but are mandatory. Compliance with these protections is required to afford due process and the equal protection of the laws. Moreover, to argue otherwise renders nugatory the expressed legislative will that is unmistakably clear.

Unquestionably, the Kentucky General Assembly intended for this statutory scheme under the Registry to protect campaign contributors from unnecessary adverse publicity and other harm which could result from investigations for these crimes outside the closed Registry process. While the Respondents' actions were widely publicized in the media and generated much publicity adverse to Naegele, the required hearings before the Registry may be closed at the option of the individual complained against. *See,* KRS 121.140 (2). KRS Chapter 121 provides numerous protections for Naegele and others accused of campaign finance violations, all of which, when considered in their entirety, afford Naegele a protected status under Kentucky law and guarantee Naegele the benefit of those safeguards embodied in Fourteenth Amendment due process.

The Sixth Circuit clearly erred by rejecting Naegele's due process claims and concluding that KRS

Chapter 121 and the Registry were not the exclusive means for investigating Naegele. The Sixth Circuit incorrectly rejected Naegele's protected status argument and incorrectly rejected the district court's interpretation of KRS Chapter 121 and the *Carroll Hubbard* decision. Although that determination partially involves a question of state law, this Court nonetheless on federal grounds should grant Naegele's petition for certiorari and review the Sixth Circuit decision since the Sixth Circuit's ruling reversing the district court is not only erroneous, but significantly implicates Naegele's federal constitutional rights.

CONCLUSION

For the reasons stated herein, Naegele respectfully submits that its petition for a writ of certiorari should be granted in the interest of resolving a conflict between the Sixth Circuit decision in this case and the decisions of other federal courts of appeals *and* in the interest of resolving an important question of federal constitutional law presented by the Sixth Circuit's ruling.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-5359

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAEGELE OUTDOOR ADVERTISING CO. OF LOUISVILLE, a Division of Naegele, Inc. - *Plaintiff-Appellee,*

v.

C. MIKE MOULTON,
LOUIS J. HOLLENBACH* and
BILLY G. WELLMAN, - - - *Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Decided and Filed September 23, 1985

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge.

ENGEL, Circuit Judge. Naegele Outdoor Advertising Company of Louisville (Naegele) brought an action under 42 U.S.C. § 1983 against C. Mike Moulton, individually and as an officer of the Kentucky State Police, Billy G. Wellman, as Commissioner of the Kentucky State Police, and Paul W. Richwalsky, Jr., as Commonwealth's attorney of Jefferson County, Kentucky, (Defendants) to enjoin De-

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*While this case was pending for decision, an election was held in which Louis J. Hollenbach succeeded Paul W. Richwalsky, Jr., as the Commonwealth's attorney of Jefferson County, Kentucky. A substitution of parties was thereafter approved pursuant to Fed. R. App. P. 43cc).

fendants from conducting a criminal investigation of Naegele. The United States District Court for the Western District of Kentucky granted a preliminary injunction prohibiting Defendants, their servants, agents, successors, and all persons in privity with them, from conducting any criminal investigation of Naegele or any of its employees for any violation of the provisions of chapter 121 of the Kentucky Revised Statutes until the Kentucky Registry of Election Finance (Registry) holds a hearing, determines that there exists probable cause to believe a willful violation has occurred, and refers the possible violation for investigation and prosecution in the manner set out in chapter 121. Defendants, being thus enjoined, appeal.

In September, 1983, a former employee of Naegele contacted the Kentucky State Police (KSP) and alleged that Naegele had defrauded some of its customers and had violated the Kentucky campaign finance laws.[1] Acting upon this complaint, Defendant Moulton and Linda Park, an Assistant Commonwealth's attorney for Jefferson County, prepared a search warrant and accompanying affidavit which were presented to a Jefferson County Circuit Court judge on November 18, 1983. Moulton subsequently executed the search warrant and seized numerous documents from Naegele. A federal search warrant was simultane-

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[1]Ky. Rev. Stat. Ann. § 121.025 (Baldwin 1981) prohibits a corporation from making political contributions, and Ky. Rev. Stat. Ann. § 121.035 prohibits a corporation from reimbursing any person who has made a political contribution. Naegele allegedly violated the campaign finance laws by directing its officers and account executives to contribute to the 1983 Kentucky gubernatorial campaign of Martha Lane[sic] Collins upon the understanding that they would be reimbursed by submitting expense vouchers to offset their contributions. Naegele allegedly defrauded its customers by simultaneously renting the same billboard space to more than one customer.

ously executed by the Federal Bureau of Investigation (FBI), which was investigating the interstate aspects of the alleged activity. The involvement of the FBI in the investigation and search is not challenged in this litigation.

Shortly thereafter, Naegele filed suit in the district court under the Civil Rights Act, 42 U.S.C. § 1983. Naegele sought injunctive relief on the ground that the investigation and search by Defendants circumvented the statutory requirements of chapter 121 of the Kentucky statute, and thereby violated Naegele's constitutional rights to due process and equal protection. Specifically, Naegele asserted that chapter 121 vests in the Registry the exclusive jurisdiction to initially investigate alleged unlawful campaign violations, and section 121.140 of the Kentucky statute requires the Registry, before referring an investigation to the Attorney General or apropriate local prosecutor, to give notice, hold a hearing, and determine whether there is probable cause to believe a willful violation has occurred. This statutory scheme, Naegele claimed, creates a constitutionally protected liberty interest in Naegele and others to be free from the stigmatizing effects and adverse publicity that normally arises out of the issuance and execution of a search warrant.

The district court agreed that chapter 121 created a constitutionally protected due process liberty interest. The district court concluded that chapter 121 allowed the Commonwealth's attorneys and the Kentucky State Police to investigate election violations only after the Registry follows the procedures in section 121.140 and refers a violation to them. According to the district court, Kentucky, through these procedures, created extensive due process rights in persons who may be charged with violating its election laws, including the right to be free from any criminal proceedings and the execution of a search warrant until prior repair is made to the Registry.

> [I]t would seem that Kentucky, by its statutes, has created in plaintiff and its officers a right to be free from stigmatizing consequences of adverse publicity, arising out of the improper issuance of a search warrant, until it has had a due process opportunity to rebut the inferences that have arisen by reason of the issuance of the search warrant.

Naegele Outdoor Advertising Co. v. *Moulton,* No. C83-1144 L(A), slip op. at 13 (W.D. Ky. March 29, 1984). Since prior repair was not made to the Registry, the court concluded that Defendants were violating the liberty interest created by KRS chapter 121, and thus preliminarily enjoined Defendants from continuing their investigation.

I.

The question we face is whether Naegele has a protected liberty interest that requires some form of due process to be given before Defendants may issue a search warrant or otherwise conduct an investigation into alleged campaign finance violations by Naegele. A liberty interest may arise from two sources—the Due Process Clause itself and the laws of the states. *Hewitt* v. *Helms,* 459 U. S. 460, 466 (1983). The Due Process Clause of the Fourteenth Amendment incorporates the Fourth Amendment prohibition against unreasonable searches and seizures. Naegele, however, does not claim that the issuance or execution of the search warrant violated the Fourth Amendment prohibition against unreasonable searches and seizures.[2] Moreover, there is no federally guaranteed constitutional right to a

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[2]Naegele notes that the affidavit supporting the search warrant was not served with the warrant; however, actual service of the affidavit has never been required as a condition to the valid execution of a warrant. The sufficiency of the affidavit is not challenged.

hearing or other process before the issuance and execution of a search warrant beyond the demands of the Fourth Amendment. Thus, if there is a protected liberty interest it must arise from the laws of Kentucky.

Whether such a liberty interest exists first depends upon whether chapter 121 of the Kentucky statute provides the exclusive means by which suspected violations of the Kentucky campaign finance laws may be initially investigated. Second, if chapter 121 provides the exclusive means or procedure, we must still determine whether the procedure itself amounts to a constitutionally protected liberty interest. We find first that section 121.140 of the Kentucky statute is not an exclusive procedure to initially investigate campaign finance violations, and second that even if it was, the procedure does not create a liberty interest. Accordingly, we reverse the order of the district court.

II.

The district court found that chapter 121 grants exclusive jurisdiction to the Registry to initially investigate unlawful campaign violations. According to the district court, the procedures set forth in section 121.140 must be followed by the Registry before a complaint of campaign finance violations may be investigated or prosecuted by Defendants. Defendants contend that the chapter does not prohibit the police or Commonwealth's attorneys from making independent investigations, but merely regulates the activities of the Registry when it performs its own duties under the chapter. We agree that chapter 121 does not prohibit the police or Commonwealth's attorneys from making independent investigations. We find nothing in the statute, the statutory history, or administrative interpretations to suggest a contrary conclusion.

Chapter 121 is a comprehensive statutory scheme for the regulation of campaign financing. The chapter pro-

hibits certain activities, including corporate contributions to candidates (section 121.025), corporate reimbursement of someone who makes a political contribution (section 121.035), and candidate promises of action to be taken when elected in consideration for a person's financial support (section 121.055). The chapter also imposes certain duties including the duty of a candidate to designate a campaign treasurer (section 121.160), the duty of the campaign treasurer to file expenditure reports (section 121.180), and the duty to register any candidate committee (section 121.170). The Kentucky Registry of Election Finance, an independent agency of the state government, is to adopt such regulations and perform such acts as are necessary to implement these duties (section 121.120). Criminal sanctions are imposed for willful violations of the chapter's provisions (section 121.990).

Naegele asserts that the provisions of section 121.120, which define the duties and powers of the Registry, and section 121.140, which relates to the investigation of complaints, amount to a grant of exclusive jurisdiction in the Registry initially to investigate alleged violations, exclusive of any independent right in the Kentucky State Police or the Commonwealth's attorneys to act. The provisions are lengthy, but we set them out in full.

> **121.120 Duties and powers of registry**
>
> (1) The registry shall appoint a full-time executive director, legal counsel and an accountant for auditing purposes, all of whom shall serve at the pleasure of the registry. The registry shall also appoint such other employes as are necessary to carry out the purposes of this chapter.
>
> (2) It shall be the duty of the registry to conduct hearings with regard to possible violations and for the effectual carrying out of its responsibilities the registry

shall have the authority to initiate a civil action in any court of competent jurisdiction for the purpose of enforcing compliance with the provisions of this chapter or enjoining violations thereof or recovering any penalty prescribed by this chapter.

(3) The registry shall adopt such regulations, official forms and perform such duties as are necessary to implement the provisions of KRS 121.015 and 121.100 to 121.200. Without limiting the generality of the foregoing the registry shall:

(a) Develop prescribed forms for the making of the required reports;

(b) Prepare and publish a manual for all candidates and committees, describing the requirements of the law, including uniform methods of bookkeeping and reporting and requirements as to reporting dates and the length of time that candidates and committees are required to keep any records pursuant to the provisions of this chapter;

(c) Develop a filing, coding and cross-indexing system;

(d) Make each report filed available for public inspection and copying during regular office hours at the expense of any person requesting copies of the same;

(e) Preserve all reports for at least four (4) years from the date of receipt;

(f) Prepare and make available for public inspection a summary of all reports grouped according to candidates and parties, containing the total receipts and expenditures, and the date, name, address and occupation, and amount contributed by each contributor, listed alphabetically, shown to have contributed in excess of one hundred dollars ($100);

(g) Prepare and publish an annual report with cumulative compilations named in paragraph (f) above;

(h) Distribute upon request, for a nominal fee, copies of all summaries and reports;

(i) Determine whether the required reports have been filed and if so, whether they conform with the requirements of this chapter; give notice to delinquents to correct or explain defections; issue an order, if appropriate, as provided in KRS 121.140 (2); make public the fact that a violation has occurred and the nature thereof;

(j) Hold public hearings, investigate any violations in reporting, and issue subpoenas for the production of any books, papers, correspondence, memorandums or other records and the attendance of witnesses which the registry deems relevant or material for the purpose of any investigation;

(k) Conduct random audits of receipts and expenditures of candidates running for city, county, urban-county government, and district offices. When the registry audits the records of any selected candidate, it shall also audit the records of all other candidates running for the same office in the selected city, county, urban-county government, or district office;

(l) Conduct audits of receipts and expenditures of all candidates running for statewide office;

(m) Candidates shall maintain their records for a period of four (4) years from the date of the general election in their respective political races;

(n) Make investigations with respect to reports upon complaint by any registered voter and to initiate proceedings on its own motion;

(o) Adopt and promulgate in accordance with this subsection a "Code of Fair Campaign Practices";

(p) Forward to the attorney general or to the appropriate commonwealth's attorney any violation of this chapter which may become the subject of civil prosecution. (Enact. Acts 1974, ch. 130, § 186, ch. 292. § 4, effective July 15, 1980).

121.140 Investigation of complaint; hearing; issuance or order; prosecution; judicial review

(1) Upon the sworn complaint of any person, or on its own initiative, the registry shall investigate alleged violations of this law. Not later than five (5) days after the registry receives a sworn complaint, or after it decides to investigate on its own initiative, it shall give notice of the investigation to the person complained against. The person complained against shall be given five (5) days from receipt of notice of the investigation in which to respond to the complaint of alleged violations of this law. Not later than five (5) days after receipt of a response from the person complained against, the registry shall:

(a) Acknowledge receipt of the complaint to the complainant, where appropriate;

(b) Acknowledge receipts of the response from the person complained against; and

(c) Notify, in writing, the person who made the complaint and the person complained against of what action, if any, the registry has taken or plans to take on the complaint together with the reasons for such action or nonaction. If the registry does not decide within five (5) days of receipt of the response what action to take, it shall notify the person who made the complaint of the reasons for the delay and shall subsequently give him the appropriate notification.

(2) When the registry concludes that there is probable cause to believe that the law has been violated, it may hold a hearing to determine if such violation has occurred. If a hearing is held, the person complained against may choose whether the hearing shall be open or closed. At the hearing, the person complained against shall have all of the protections of due process, including but not limited to the right to be represented by counsel, the right to call and examine witnesses, the right to the production of evidence by subpoena, the right to introduce exhibits and the right to cross-examine opposing witnesses. When the registry determines that the preponderance of the evidence shows a violation has occurred, it shall issue an order to the violator to comply with any one or more of the following requirements:

(a) To cease and desist violation of this law;

(b) To file any reports or other documents or information required by this law; or

(c) To pay a penalty not to exceed one hundred dollars ($100) a day for failure to file any report or other document or information required by law until such report, document or information is filed.

(3) If the registry concludes that there is probable cause to believe that the law has been violated willfully, it may refer such violation to the attorney general or to the appropriate local prosecutor for investigation and prosecution. The attorney general or the appropriate local prosecutor shall have responsibility for prosecutions under the law and may request from the registry all evidence collected in its investigation.

(4) Any person directly involved or affected by an action of the registry which is final, other than of a determination to refer a violation to the attorney gen-

eral or to the appropriate local prosecutor for prosecution, may seek judicial review of such action.

(5) If judicial review is sought of any action of the registry relating to a pending election, the matter shall be advanced on the docket of the court. The court may take any steps authorized by law to accelerate its procedures so as to permit a timely decision.

Naegele asserts that one can infer from the foregoing provisions that the Kentucky legislature intended the Registry to have exclusive jurisdiction to initially investigate alleged violations. We cannot agree. There is nothing in these two provisions that states that the Registry has exclusive jurisdiction or that the police or local prosecutors shall forward information of potential violations to the Registry. To the contrary, section 121.140 provides that the Attorney General or appropriate local prosecutor shall have responsibility for prosecutions, and they may request from the Registry all evidence collected in its investigation. In addition, section 121.990(11) provides that "the attorney general, Commonwealth's attorney, the registry, or any qualified voter may sue for injunctive relief to compel compliance with the provisions of KRS 121.100 to 121.200." The Attorney General and Commonwealth's attorney necessarily will have to investigate before knowing when it is appropriate to sue. The express statutory language contemplates both the involvement of the Registry and traditional law enforcement personnel in investigating violations of the campaign finance laws.

The statutory history also shows that the Kentucky legislature adopted the procedures of section 121.140 to guide the decision-making of the Registry, not to vest the Registry with exclusive jurisdiction to the exclusion of traditional law enforcement personnel. Direct and indirect corporate contributions to candidates for political office in

Kentucky have been prohibited by Kentucky since the Corrupt Practices Act of 1916, 1916 Ky. Acts 53, (1916 Act). According to its Preamble, the 1916 Act was enacted "to promote pure elections, primaries, and conventions, and to prevent corrupt practice in the same; to limit the expenses of candidates; to prescribe the duties of candidates and providing penalties and remedies for violations, and declaring void, under certain conditions, elections in which these provisions or any of them have been violated." The 1916 Act made it unlawful "for any corporation . . . to contribute, either directly or indirectly, money, service or thing of value, towards the nomination or election of any State, county, city, town, district or municipal officer . . . ." This provision prohibiting corporate political contributions has remained virtually unchanged and is now codified as section 121.025. The prohibition presently found in section 121.035 has remained virtually unchanged since 1922. Carroll's Kentucky Statutes §§ 1574a-1, 1574a-2 (6th Ed. 1922).

The 1916 Act provided that any corporation or agent that makes a political contribution was guilty of a misdemeanor. The police and local prosecutors would investigate and enforce these provisions. There was no Registry. The commissions and county boards that were authorized to issue certificates of election were "without authority either to charge or adjudge a candidate guilty of violating the act." *Young* v. *Jefferson County Election Commission,* 304 Ky. 81, 201 S. W. 2d 111, 113 (1947). A defeated candidate could contest an election, but only if he was not himself guilty of corrupt practices. *Britton* v. *Garland,* 335 S. W. 2d 329, 331 (Ky. 1960). Thus, the police and local prosecutors were the only effective enforcement mechanism of the 1916 Act.

In 1966, the Kentucky legislature created the Kentucky Registry of Election Finance as an independent agency of the state government. The 1966 Act, 1966 Ky. Acts 903,

provided greater regulation of campaign contributions and expenditures. The Act continued to require candidates to file expenditure reports, but now the reports were to be sent to the Registry and checked by the Registry for accuracy. The 1966 Act, however, did not refer in any way to those provisions of the 1916 Act that prohibited corporations from making political contributions.

In creating the Registry, the legislature also imposed upon it the duty to adopt such regulations, forms, and duties as were necessary to implement the provisions of the Act. Under the 1966 Act, while its role was limited, the Registry could contest an election. *Dempsey* v. *Stovall,* 418 S. W. 2d 419 (Ky. 1967). The Act, however, contemplated that the Commonwealth's attorneys would investigate and prosecute violations. The Act provided that "[t]he Registry shall also report to the Attorney General and the Commonwealth's attorneys such list [of candidates delinquent in filing statements and reports]." The continued enforcement by the Commonwealth's attorneys of the provisions prohibiting corporate contributions is implicit since the 1966 Act did not refer to them.

The Kentucky legislature further amended the campaign finance laws in 1974. The Corrupt Practices Act of 1974, 1974 Ky. Rev. Stat. & R. Serv. 697 (Baldwin), undoubtedly a response to Watergate, was "a complete reform program designed for present day elections. As a part of this reform program, the Registry of Election Finances, which had been created in 1966, was given supervisory control over all election financing. . . . [T]he Registry had struggled for recognition in controlling campaign fund raising and expenditures. The reform program gave the Registry the necessary strength to monitor effectively all of the financial aspects of political campaigns." *Lee* v. *Commonwealth,* 565 S. W. 2d 634, 636 (Ky. App. 1978). Under the new scheme, the Registry, as well as any candi-

date for office or any qualified voter, could bring an action to declare a vacancy. *Kentucky Registry of Election Finance* v. *Jordan*, 583 S. W. 2d 90, 96 (Ky. App. 1979). With the creation of a stronger Registry, it was no longer the choice of a defeated candidate alone to determine whether a penalty should be exacted for failure to comply with the statute. *Id.* at 97.

The 1974 amendments clearly strengthened the investigatory and supervisory power of the Registry. The amendments provided for a full-time executive director, legal counsel, and an accountant for auditing, and authorized the Registry "to make investigations with respect to reports upon complaint by any registered voter, and to initiate proceedings on its own motion." Also, authority was given to the Registry to initiate civil actions for the purpose of enforcing compliance with the provisions of chapter 121, enjoining violations thereof, or recovering any penalty prescribed by chapter 121. The Registry became a "watchdog" over election financing to insure that Kentucky's elections would not be corrupted. Nevertheless, there is nothing in the amendments to indicate an intent of the legislature to restrict the enforcement activities of the Commonwealth's attorneys or police. The amendments provided that the Registry is to "forward to the attorney general or the appropriate commonwealth's attorney any violations of this chapter which may become the subject of civil prosecution." Further, the amendments provided that after a preliminary investigation and a hearing, "the registry itself, if it has reasonable grounds to believe that a violation of this chapter has occurred shall initiate action and notify the attorney general or the appropriate commonwealth's

attorney of the suspected violation."[3] The 1974 amendments contemplate a joint enforcement effort between the traditional enforcement personnel and the new stronger independent Registry.

In 1980, the Kentucky legislature again amended the campaign finance laws. The 1980 amendments, 1980 Ky. Acts 949, added administrative sanctions in addition to the civil and criminal penalties. The Registry was authorized, after it determined that the preponderance of the evidence showed a violation had occurred, to issue an order to a violator:

(a) To cease and desist violation of this law;

(b) To file any reports or other documents or information required by this law; or

(c) To pay a penalty not to exceed one hundred dollars ($100) a day for failure to file any report or other document or information required by law until such report, document or information is filed.

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[3]This language is from the forerunner of Ky. Rev. Stat. Ann. § 121.140. The section provides in full:

> Any registered voter who believes a violation of this chapter has occurred may file a complaint under oath with the registry such complaint shall be kept confidential pending final determination of the merits of the complaint by the registry. The Registry shall conduct a preliminary investigation of the merits of such complaint. If the registry determines that there are no reasonable grounds to believe that a violation has occurred, the complaint shall be dismissed. If the registry determines that there are such reasonable grounds, it shall give notice summoning the persons believed to have committed the violation to a hearing. The registry shall adopt such regulations to govern the conduct of a hearing. The registry itself, if it has reasonable grounds to believe that a violation of this chapter has occurred the registry shall initate action and notify the attorney general or the appropriate commonwealth's attorney of the suspected violation.

The criminal penalty provisions of the Act were amended to provide for criminal punishment only for willful violations, and the 1980 amendments authorized the Attorney General as well as the Registry, a defeated candidate or qualified voter, to contest an election. The 1980 amendments set forth in greater specificity procedures the Registry must follow upon receipt of a complaint or if on its own initiative it believes a violation has occurred. These procedures, at section 121.140, require notice to be given persons complained against within five days of the receipt of a sworn complaint or of a decision to investigate; require the Registry to find probable cause to believe that the law had been violated before it holds a hearing; and require further procedural safeguards to be followed in the hearing. The amendments also expressly provide that the Registry may refer a violation to the local prosecutor if there is probable cause to believe the law had been violated. The 1980 amendments, however, make no effort to restrict the traditional powers of law enforcement entrusted to the Commonwealth's attorney or the Attorney General. If anything, the Attorney General's powers were strengthened.

As indicated earlier, Naegele allegedly violated sections 121.025 and 121.035. The activity prohibited by these sections had been made criminal consistently since 1916 and had been within the power of the Commonwealth's attorneys and police to investigate and prosecute since that date. There was no Registry in 1916; only the police and Commonwealth's attorneys investigated violations. Nothing in the later amendments to the Corrupt Practices Act of 1916 indicates any intent on the part of the Kenutcky legislature to deprive the traditional law enforcement officers of their traditional rights to enforce the election laws. Clearly, the objective of the later amendments has been to increase rather than to limit regulation of elections and the control

of possible violators.[4] Since the Registry was an agency unknown to Kentucky law until 1976, it follows that the procedures for carrying out its duties necessarily had to be spelled out by the legislature. That the legislature saw fit in 1980 to expand those duties and to refine the procedures of the Register does not in our judgment indicate any implied and certainly no expressed or avowed intent to vest exclusive authority in the Registry to the exclusion of the traditional law enforcement personnel of Kentucky.

We think it important that the Attorney General of Kentucky has by his appearance on behalf of Defendants asserted the continuing authority of Defendants to investigate and prosecute criminal violations under chapter 121. This view is corroborated by John W. Craig, former Executive Director of the Registry. In a sworn affidavit attached to Defendant's response to Naegele's motion for preliminary injunction, Craig stated that he had been the Executive Director of the Registry continuously from July 1, 1976 until the date of the affidavit on December 27, 1983, and was responsible for the execution of the administrative policies of that agency. He stated further that on occasion during his tenure as Executive Director, the Kentucky State Police had conducted preliminary investigations into violations of the Kentucky Corrupt Practices Act prior to any formal complaint having been filed with the Registry.

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[4]The thrust of the amendments often was to augment the traditional powers because of a belief that in certain cases the enforcement of the Act might not be pursued with sufficient diligence by the Kentucky officers traditionally entrusted with that responsibility. Thus, the creation of a special prosecutor, coming as it did during the Watergate era, would be reflective of a concern not to replace the Commonwealth's attorney as the officer for enforcing election laws but, rather, to provide an alternative where that officer was unwilling or unable to do so. *See* Ky. Rev. Stat. Ann. § 121.990(12).

Finally, Craig stated under oath that "the Registry has not and does not construe or apply KRS 121.140 as prohibiting a *bona fide* law enforcement agency of appropriate jurisdiction from engaging in preliminary investigations of criminal violations of KRS 121.025 or 121.035." To our knowledge, no evidence to the contrary was placed before the district court by Naegele, and we are mindful that "great deference is always given to an administrative agency in the interpretation of a statute within its specific province." *Commonwealth ex rel Beshear* v. *Kentucky Utilities Co.*, 648 S. W. 2d 535, 537 (Ky. App. 1982).

In conclusion, we believe that it was error for the trial judge even tentatively to have concluded that the statutory scheme in Kentucky vested exclusive control in the Registry to the exclusion of the Kentucky State Police or the Commonwealth attorneys to independently investigate. The statutory scheme shows only a desire to supplement the traditional authority by increasing the powers and responsibility of the Registry, not to replace the authority of others.

Even assuming, however, an intent to vest exclusive responsibility in the Registry, we do not believe the Kentucky legislature created an identifiable and protected liberty interest of such proportions as to entitle it to protection as a matter of federal constitutional law.[5]

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[5]The district court and Naegele relied heavily upon *Carroll Hubbard for Governor Committee* v. *Kentucky Registry of Election Finance*, No. C79-0157P(B) (W.D. Ky. December 23, 1982), *on remand* from No. 80-3106 (6th Cir. 1981) (order) *rev'g*, 477 F. Supp. 184 (W.D. Ky. 1979). In *Hubbard*, the Registry referred possible violations of KRS chapter 121 to the Commonwealth's attorney without affording a hearing to the Carroll Hubbard for Governor Committee. The Committee brought suit alleging that the failure to conduct a hearing violated its First and Fourteenth Amendment rights. The district court abstained on grounds that

(Footnote Continued on Next Page)

III.

A liberty interest can be created by state law, and once such a liberty interest has been created, the Due Process Clause of the Fourteenth Amendment acts to insure that the state created right is not arbitrarily abrogated. *Bills* v. *Henderson,* 631 F. 2d 1287, 1291 (6th Cir. 1980). While the bounds of this concept have never been clearly delineated by the Supreme Court, it did, in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), hold with respect to property interests that:

> Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U. S. at 577.

Although the Supreme Court has not clearly delineated when a protected liberty interest will arise, the Court has stated that in two situations a liberty interest will not arise. First in *Paul* v. *Davis,* 424 U. S. 693, 711 (1976), the Court held that the interest in reputation alone is not sufficient to

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it would be interfering with a state criminal prosecution. We reversed. On remand, the district court interpreted our order as mandating a hearing prior to the Registry's referral of possible violations to the Commonwealth's attorneys. However, the sole issue decided by the Sixth Circuit was that the abstention doctrine did not apply; nothing more was decided.

invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. In *Davis*, the photograph and name of plaintiff Davis appeared in a "flyer" of "active shoplifters" that was sent to area businessmen by defendant Paul, the Chief of Police for Louisville, Kentucky. Davis brought an action under 42 U.S.C. § 1983 for damages and injunctive relief alleging a violation of rights guaranteed to him by the Constitution. The district court dismissed the complaint for failing to state a claim; the court of appeals reversed finding that the alleged facts, if true, constituted a denial of due process. The Supreme Court granted certiorari to decide "whether [Davis'] charge that [Paul's] defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment." *Id.* at 694. The Court decided that it did not.

The Court recognized the "frequently drastic effect of the 'stigma' which may result from defamation by the government," but concluded, nonetheless, that "reputation alone, apart from some more tangible interests" was neither liberty nor property by itself to invoke the procedural protection of the Due Process Clause. *Id.* at 701. Those interests recognized as liberty or property "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and . . . the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." *Id.* at 710-11 (footnote omitted). There must be "as a result of the state action complained of, a result or status previously recognized by state law [that is] distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we [the Court] found sufficient

to invoke the procedural guarantees . . . ." *Id.* at 711. Thus, it was the "accompanying loss of government employment" not defamation alone that required procedural due process in *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961). *Davis,* 424 U. S. at 705-06. Likewise, it was the "right to purchase or obtain liquor in common with the rest of the citizenry" not defamation alone that required procedural due process in *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971). *Davis* 424 U. S. at 708-09. In conclusion, *Davis* holds that defamation alone will not suffice, but must accompany the alteration of a recognized interest or status created by the state.

Second, the Supreme Court in *Olim* v. *Wakinekona,* 461 U. S. 238, 250 n.12 (1983), recognized "that an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." In *Olim,* the issue before the Court was whether the transfer of a prisoner from a state prison in Hawaii to one in California implicates a liberty interest within the meaning of the Due Process Clause. Although the applicable state regulations provided that prior to a prison transfer, an impartial program committee was required to hold a hearing, afford the inmate an opportunity to be heard, and allow the inmate to confront and cross-examine witnesses, the Court found that the regulations did not create a liberty interest since the regulations placed no substantive limitations on official discretion. *Id.* at 249. The Court stated that " '[a] liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality.' [quoting *Shango* v. *Jurich,* 681 F. 2d 1091, 1100-01 (7th Cir. 1982)] Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim,* 461 U. S. at 250 (footnote omitted). A state may choose to

require procedures for reasons other than protection of substantive rights. *Id.* at 250-51.

This same point was made by the Supreme Court in *Hewitt* v. *Helms,* 459 U. S. 460, 471 (1983). In *Helms,* Pennsylvania created a careful procedural structure to regulate the use of administrative segregation. The Court stated that the mere fact that Pennsylvania created a careful procedural structure does not indicate the existence of a protected liberty interest. *Id.*

> The creation of procedural guidelines to channel the decision-making of prison officials is, in the view of many experts in the field, a salutary development. It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those [that] federal courts might also impose under the Fourteenth Amendment, that the State chose to require.

Id.

The reason procedural rights do not create liberty interests in and of themselves is, we believe, a convincingly stated by Judge Kennedy in *Bills* v. *Henderson,* 631 F. 2d 1287 (6th Cir. 1980) (cited with full approval by the Supreme Court in *Olim* and by the Seventh Circuit in *Jurich*).

> [W]e conclude that procedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest. The problem with allowing such a procedural rule to create a protected liberty entitlement is that the

> procedural due process analysis breaks down when the second prong of the analysis, the determination of what process is due, is applied. If the standard analysis is applied and interests are balanced as required in *Wolff* v. *McDonnell,* [418 U. S. 539 (1974)] then the process that is due in a given instance may bear little or no resemblance to the original expectation and so will do little or nothing to protect it. . . . The only alternative to the *Wolff* balancing determination would be to equate the process due with the original procedural expectations. If that approach were adopted, there would be a constitutional procedural due process right to have states adhere to any procedural rules promulgated by them. While such adherence is certainly desirable, every deviation from state procedures cannot be viewed as a federal constitutional violation. Such a holding would make a large volume of state proceedings in the prison setting, in executive agency proceedings, and in judicial proceedings subject to complaint in the federal courts on due process grounds. We decline to so expand procedural due process.

631 F. 2d at 1298.

In *Davis, supra,* the Court stated that a liberty interest will only arise when, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711. Other than the provisions in section 121.140 of the Kentucky statute governing the activities of the Registry itself, nothing in section 121.140 or its statutory history indicates any intention on the part of the Kentucky legislature to confer any special benefit or protection upon persons accused of violating the Kentucky campaign finance laws. Clearly, the objective of the Kentucky campaign finance laws has been to increase rather than to limit the regulation of elections and control of possible violators. Hence, in

essence, the question we face is whether the procedures of section 121.140 create a liberty interest.

A careful examination of the legislative and administrative scheme under scrutiny here convinces us that the procedures of section 121.140, as salutary as they may be, reflect no design by the Kentucky legislature to confer any special status upon Naegele let alone one which rises to a liberty interest. We find persuasive the language of the Supreme Court in *Hewitt* v. *Helms*, 459 U. S. 460, 471 (1983), "[i]t would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those [that] federal courts might also impose under the Fourteenth Amendment, that the State chose to require."

Accordingly, we REVERSE the order of the district granting a preliminary injunction and REMAND for proceedings consistent with this opinion.

No. 84-5359

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NAEGELE OUTDOOR ADVERTISING CO. OF LOUISVILLE, a Division of Naegele, Inc., - - - - *Plaintiff-Appellee,*

v.

C. MIKE MOULTON;
LOUIS J. HOLLENBACH;
BILLY G. WELLMAN, - - - *Defendants-Appellants.*

ORDER—Filed November 22, 1985

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge.

Appellee having filed a petition for rehearing with this court, and this court having considered said petition and finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman/cl
Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-1144 (L(A)

NAEGELE OUTDOOR ADVERTISING
COMPANY OF LOUISVILLE,
A Division of Naegele, Inc., - - - *Plaintiff,*

v.

C. MIKE MOULTON, et al., - - - - *Defendants.*

FINDING OF FACT, CONCLUSION OF LAW AND MEMORANDUM OPINION

This action is submitted to the Court on the motion of the defendants to dismiss and to dissolve the temporary restraining order previously entered in this action, and on plaintiff's motion for a preliminary injunction.

The Court believes that the facts are undisputed and that, therefore, the motions of the parties may be decided upon the matters or record and the briefs filed by the parties, although ordinarily an evidentiary hearing would be required.

This action was brought pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 1983. On or about September 7, 1983, defendant C. Mike Moulton, who is an officer of the Kentucky State Police (hereinafter KSP) and KSP were contacted by William Tolliver, a former employee of plaintiff, who had been dismissed by it on or about May 5, 1983. According to an affidavit executed by defendant Moulton, Tolliver provided Moulton and KSP information about

alleged fraudulent business practices of plaintiff. Also according to Moulton, on November 17, 1983, Tolliver introduced Moulton and KSP to a current employee of plaintiff referred to as an "informant," who made charges that Naegele and certain unnamed officers and account executives of Naegele had committed acts which were violations of KRS 121.025 and 121.035.

Based on this information, KSP apparently believed that plaintiff had made improper political contributions to the Collins' Campaign Committee in the 1983 gubernatorial campaign. A search warrant was issued on the basis of Moulton's affidavit on November 18, 1983 by the Honorable Joseph H. Eckert, Judge of the First Division of the Jefferson Circuit Court, authorizing a search of Naegele's premises and place of business. On November 18, 1983, Moulton and four other KSP, pursuant to the state search warrant, and fourteen Agents of the Federal Bureau of Investigation (hereinafter FBI), who were acting pursuant to a federal search warrant, entered plaintiff's office and seized numerous documents from it.

Plaintiff contends that KRS 121, and more specifically 121.120 and 121.140, and 801 KAR 2:010 set forth detailed procedures which must be followed by the Registry of Election Finance (hereinafter Registry) before a complaint of election law violations can be investigated and prosecuted. See KRS 121.140(2), which requires that the Registry first have a complaint to determine whether there is probable cause to believe that the law has been violated, and then hold a due process hearing to determine if a violations has occurred. Under KRS 121.140(3), the Registry may, if there is probable cause to believe that a willful violation has occurred, refer the matter to the Commonwealth's Attorney for investigation and prosecution.

Count I of the complaint alleges that the actions of Moulton and KSP have violated the Fourth and Fourteenth

Amendment due process rights of the plaintiff, as well as the statutory rights and regulatory rights set out under Kentucky law.

Count II, in essence, alleges violations of due process and equal protection.

Count III, in essence, alleges that defendant are acting under the color of state law and, thus, are violating 42 U.S.C. § 1983. Proper allegations are also made as to irreparable injuries.

This case is a sequel to the case of *Carroll Hubbard for Governor Committee* v. *Kentucky Registry of Election Finance,* 477 F. Supp. 184 (W.D. Ky. 1979), *rev'd and remanded,* No. 80-3106 (6th Cir. 1981), following which District Judge Thomas A. Ballantine, Jr. entered a memorandum opinion sustaining the contention of the plaintiffs that they were entitled to notice of charges and to a hearing before any civil or criminal proceedings were instituted by the defendants. See opinion entered on December 23, 1982, No. 79-0157 P(B).

In that case, Carroll Hubbard was a candidate for the Democratic nomination for Governor in the primary election of 1979. Two state policemen received information from individuals regarding alleged violations of KRS 121. 150(4) by the Hubbard for Governor Committee. Upon receipt of a report of that investigation, the Registry, in a closed door special session, determined that reasonable grounds existed to believe that the Committee had accepted cash contributions in violation of the statute. The Registry referred the matter to the Attorney General and the appropriate Commonwealth's Attorney, and publically announced its determination that reasonable grounds existed to believe that the Committee had violated KRS 121.150 (40), and that the matter had been referred to the Commonwealth's Attorney.

The plaintiffs also alleged that the Commonwealth's Attorney for Graves County took files of the investigation by the Registry home and allowed the media to inspect them. An article appeared in the newspapers on May 28, 1979, one day prior to the primary election, revealing the alleged misconduct by Hubbard and the treasurer of the Committee. On June 5, 1979, the Committee filed a motion for a hearing. The Registry then denied the motion, and on July 19, 1979, the Commonwealth's Attorney directed the Sheriff of Breathitt County to issue a subpoena to be returned prior to the meeting of the Grand Jury of Graves County.

Judge Ballantine originally held that the action of the Committee was barred by the abstention doctrine set out in *Younger* v. *Harris,* 401 U. S. 37 (1971). The Sixth Circuit Court of Appeals held that the *Younger* doctrine was not applicable to state administrative proceedings of the Registry. It then proceeded to determine whether the *Younger* doctrine prohibited a federal court from preliminarily enjoining the Attorney General or Commonwealth's Attorney from initiating a criminal proceeding. The Court held that *Younger* was applicable when there is formal criminal litigation pending in state court, but that in the case before it, no evidence had been presented to the Grand Jury and abstention was not appropriate when plaintiff did not have the opportunity to present their federal claims in the state proceeding.

The Court went on to hold that the plaintiff had alleged due process violations in the Registry proceedings, and that the legality of the Registry's proceedings, without notice of the hearing to the plaintiff, could not be raised in defense of the pending criminal prosecution.

Judge Ballantine, in his subsequent memorandum opinion, noted that he had no evidence from which to conclude that an equal protection violation had occurred, but that he

was bound to comply with the mandate of the Sixth Circuit and to enjoin any further proceedings by the Registry until plaintiffs had been afforded a due process hearing. He also held that the plaintiffs were entitled to notice of charges against them, and to a hearing before any criminal or civil proceedings were instituted by defendants. It is to be noted in that connection that the defendants included the Kentucky Attorney General and the Commonwealth's Attorneys for Graves and Breathitt Counties. He also reached the conclusion that plaintiffs had shown irreparable harm because indictment of a political candidate would, in essence, show irreparable injury by being the target of an indictment.

In the instant case, KRS 121.140 was enacted in 1980, repealing the previous statute, and provides as follows:

> (1) Upon the sworn complaint of any person, or on its own initiative, the registry shall investigate alleged violations of this law. Not later than five (5) days after the registry receives a sworn complaint, or after if decides to investigate on its own initiative, it shall give notice of the investigation to the person complained against. The Person complained against shall be given five (5) days from receipt of notice of the investigation in which to respond to the complaint of alleged violations of this law. Not later than five (5) days after receipt of a response from the person complained against, the registry shall:
>
> (a) Acknowledge receipt of the complaint to the complainant, where appropriate;
>
> (b) Acknowledge receipt of the response from the person complained against; and
>
> (c) Notify, in writing, the person who made the complaint and the person complained against of what action, if any, the registry has taken or plans to take

on the complaint, together with the reasons for such action or nonaction. If the registry does not decide within five (5) days of receipt of the response what action to take, it shall notify the person who made the complaint of the reasons for the delay and shall subsequently give him the apropriate notification.

(2) When the registry concludes that there is probable cause to believe that the law has been violated, it may hold a hearing to determine if such violation has occurred. If a hearing is held, the person complained against may choose whether the hearing shall be open or closed. At the hearing, the person complained against shall have *all of the protections of due process,* including but not limited to the right to be represented by counsel, the right to call and examine witnesses, the right to the production of evidence by subpoena, the right to introduce exhibits and the right to cross-examine opposing witnesses. When the registry determines that the preponderance of the evidence shows a violation has occurred, it shall issue an order to the violator to comply with any one or more of the following requirements:

(a) To cease and desist violation of this law;

(b) To file any reports or other documents or information required by this law; or

(c) To pay a penalty not to exceed one hundred dollars ($100) a day for failure to file any report or other document or information required by law until such report, document or information is filed.

(3) If the registry concludes that there is probable cause to believe that the law has been violated *willfully,* it may refer such violation to the attorney general or to the appropriate local prosecutor for investigation and prosecution. The attorney general or the appro-

priate local prosecutor shall have responsibility for prosecutions under the law and may request from the registry all evidence collected in its investigation.

(4) Any person directly involved or affected by an action of the registry which is final, other than of a determination to refer a violation to the attorney general or to the appropriate local prosecutor for prosecution, may seek judicial review of such action.

(5) If judicial review is sought of any action of the registry relating to a pending election, the matter shall be advanced on the docket of the court. The court may take any steps authorized by law to accelerate its procedures so as to permit a timely decision. (Emphasis added).

Analysis of KRS 121.140 and the very wording of 121.140(2) reveal an intent of the Legislature to set up a procedure fully complying with due process, whereby the Registry, having investigated on its own initiative or on the sworn complaint of any person, alleged violations of the law, is required to give a five (5) day notice to the alleged violator and give the alleged violator five (5) days to respond to the notice. When the Registry believes that there is probable cause that the law has been violated, the statute provides that it may hold a hearing to determine if the violation has occurred, and that hearing must be a full due process hearing. If it then concludes that there has been a willful violation of law, reference is made to the Attorney General or the appropriate local authorities for prosecution.

While we note that the word "may" is used in KRS 121.140(2) in connection with the hearing, we believe that a reading of the statute as a whole would indicate that, where an alleged violator denies that a violation has occurred, then there must be a hearing.

The evidence in this case reflects that the defendants Moulton and KSP have usurped the functions of the Registry. In doing so, they have circumvented the requirements of KRS 121, which clearly provides that criminal proceedings, or search warrants leading to criminal proceedings, should not be initiated until the Registry and the alleged violator of the election laws have followed the procedures set out in KRS 121. In fact, the Registry has the power to issue subpoenas, and this could have been done if the Registry had proceeded in the manner contemplated by the statute and without the resultant publicity and irreparable injury which accrued to the plaintiff.

Defendants contend first that this Court does not have jurisdiction because of the holding of the United States Supreme Court in *Pennhurst State School & Hospital* v. *Halderman*, ___ U. S. ___, 104 S. Ct. 900 (1984). The defendants also contend that if they are wrong in this respect, this Court should abstain from deciding the matter.

Pennhurst, supra, was decided after this Court entered its temporary restraining order and, of course, several years after the decisions of Judge Ballantine and the Sixth Circuit Court of Appeals in *Hubbard, supra. Pennhurst,* by a five to four vote, reversed the *en banc* decision of the Third Circuit Court of Appeals, 673 F. 2d 647 (1982). The Supreme Court held that the Eleventh Amendment barred the federal courts from taking jurisdiction of a claim against a state and state officials which was based on an alleged violation of state law by the officials.

In *Pennhurst, supra,* the majority opinion points out that if a state official acts unconstitutionally under the Fourteenth Amendment, the federal courts may intervene to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States," citing *Ex parte Young,* 209 U. S. 123 (1908). *Id.* at 910.

The Court then went on to analyze the holding in *Edelman* v. *Jordan*, 415 U. S. 651 (1974), where it was held that a plaintiff could secure prospective relief against a state for a violation of his constitutional rights, whereas he could not secure retroactive relief. *Pennhurst, supra,* does not provide an easy answer to the complexities produced by the case at bar.

It is clear that plaintiff has set out in great detail violations of state statutes, namely KRS 121, and has asked for relief which it contends is mandated by the reading of the statutes. If the complaint had stopped there, this Court would have no difficulty in concluding that *Pennhurst, supra,* would bar its right to hear this case, since purely a state matter would be involved. However, plaintiff has gone beyond the mere allegations that plaintiff's conduct is violating state law, and advances the proposition that defendants' conduct is in violation of the Fourteenth Amendment. As noted in *Pennhurst,* at p. 907 and again at p. 910, Congress has the power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity. See *Fitzpatrick* v. *Bitker,* 427 U. S. 445 (1976).

We note also that the Court in *Pennhurst* held that relief sought against a state official is, in fact, against the sovereign if "the state is the real, substantial party in interest," citing cases. *Id.* at 908. However, those citations are followed by the Court's citation of *Ex parte Young, supra,* and its holding that a suit challenging the constitutionality of a state official's action is not one against the state. *Id.* at 909. We conclude that *Pennhurst, supra,* does not bar the plaintiff from bringing this suit in this Court.

We now proceed to examine the defendants' claim that this Court should abstain from taking action because of the fact that defendants had initiated the search warrant proceedings in state court. The answer to that contention is

found in the Sixth Circuit Court of Appeals' opinion in *Hubbard, supra,* where it held that a federal court should not abstain when no evidence had been presented to the Grand Jury, and when plaintiffs had not had the opportunity to present their claims in the state proceedings. In the instant case, only a search warrant has been served and returned, and no evidence has been presented to the Grand Jury. Therefore, abstention is inappropriate.

Coming now to the substance of the motion for a preliminary injunction, it is clear that Kentucky has provided extensive due process rights to persons who may be charged with violating its election laws, particularly with reference to contributions. In creating these extensive due process rights, which include the right to be free from any criminal proceedings and the execution of a search warrant, Kentucky has placed sweeping powers in the Registry to initiate investigation to determine if there has been a violation of election laws. These powers include the power to issue subpoenas, but do not include the power to issue search warrants, leaving that power to the Commonwealth's Attorneys after the Registry has cause to believe that a willful violation has taken place.

With reference to alleged violations of election laws, these statutes seem to establish a liberty interest in the alleged violator which must be vindicated by a due process hearing in advance of any criminal procedures. We have not been able to find any case strictly in point, but believe that cases such as *Vitek* v. *Jones,* 445 U. S. 480 (1980), lead to the conclusion that a state statute which creates a liberty interest may also entitle a plaintiff to the procedural protection of the Due Process Clause of the Fourteenth Amendment. *Id.* at 488.

While *Vitek, supra,* invokes the involuntary transfer of a state prisoner to a mental hospital which, in turn, involves the stigmatization of an individual and adverse social con-

sequences, thereby bringing into play the due process requirements, it would seem that Kentucky, by its statutes, has created in plaintiff and its officers a right to be free from stigmatizing consequences of adverse publicity, arising out of the improper issuance of a search warrant, until it has had a due process opportunity to rebut the inferences that have arisen by reason of the issuance of the search warrant.

We note that where a person's good name, reputation, honor, or integrity is at stake because of what the Government is doing to him, notice and opportunity to be heard are essential. See *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564 (1972); *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971); see also, *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951); *United States* v. *Lovett,* 328 U. S. 303 (1946); *Peters* v. *Hobby,* 349 U. S. 331 (1955) (Douglas, J. concurring); *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961).

In the case at bar, wide-spread publicity has made it obvious that the good name, reputation or honor of plaintiff is at stake because of the information that was obtained as a result of the issuance and execution of the search warrant.

We believe also, for the reasons articulated by Judge Ballantine in his second opinion, that plaintiff has not shown its right to a judgment under the Equal protection Clause. At this phase of the proceedings, it has not introduced proof to show that other organizations are given all of the protections of the statutes, whereas plaintiff has not been given them.

Plaintiff is entitled to the entry of a preliminary injunction under the criteria set out in *Mason County Medical Association* v. *Knebel,* 563 F. 2d 256 (6th Cir. 1977). There the Court held that plaintiff must meet four standards:

1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;

2) Whether the plaintiffs have shown irreparable injury;

3) Whether the issuance of a preliminary injunction would cause substantial harm to others;

4) Whether the public interest would be served by issuing a preliminary injunction.

See 563 F. 2d at 261.

In the instant case, in light of Judge Ballantine's opinion and the Sixth Circuit's opinion in *Hubbard, supra,* and in light of this Court's findings as to the violation by defendants of plaintiff's constitutional rights, plaintiff has shown a strong probability of success on the merits. As to the second standard, that of irreparable injury, it is well established that where constitutional rights are violated, irreparable harm flows. See *Elrod* v. *Burns,* 427 U. S. 347 (1976). As to the third standard, it is apparent that the issuance of a preliminary injunction would cause no harm to defendants or others. As to the fourth standard, it is apparent that the public interest is served by requiring public officials to follow the procedures mandated to be followed by the Kentucky statutes.

In light of the conclusions reached above, we have this day entered a preliminary injunction.

Dated 3-29-84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 84-1144 L(A)

NAEGELE OUTDOOR ADVERTISING
COMPANY OF LOUISVILLE,
A Division of NAEGELE, INC., - - - *Plaintiff,*

v.

C. MIKE MOULTON, et al., - - - - *Defendants.*

PRELIMINARY INJUNCTION

The Court, having considered the motion of the plaintiff for a preliminary injunction and the motion of the defendants to dissolve the temporary restraining order previously entered, and the Court, having reviewed the pleadings, briefs and papers on file and having entered its findings of fact, conclusions of law, and memorandum opinion, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the plaintiff's motion for a preliminary injunction be and it is hereby sustained,

IT IS FURTHER ORDERED AND ADJUDGED that the motion of the defendants to dissolve or dismiss the temporary restraining order is overruled.

IT IS FURTHER ORDERED AND ADJUDGED that defendants, their servants, agents, successors, and all persons in privity with them, be and they are hereby enjoined from conducting any criminal investigation, or commencing any claims against Naegele or any of its employees, for any violation of the provisions of KRS 121 until such time as a sworn

complaint alleging the violations shall be made to the Kentucky Registry of Election Finance, and until plaintiff and any of its employees who are alleged to have violated that statute shall have been afforded their rights as set forth in KRS 121 and 801 KAR 2:010, and the Registry has made a conclusion of probable cause that the law has been willfully violated, and has referred the alleged violation for investigation and prosecution in the manner set out in KRS 121.

IT IS FURTHER ORDERED AND ADJUDGED that defendants return to plaintiff any documents seized pursuant to items B, I and J listed on the November 18, 1983 search warrant.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff retain in its file until further orders of the Court all documents ordered returned to it by this Court.

This is not a final and appealable judgment, the question of attorneys' fees not having been decided, and the parties are hereby ordered to brief that question following the submission of an application by plaintiff for a specific fee.

Dated 3-29-84

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-83-1144-L-A

NAEGELE OUTDOOR ADVERTISING CO. OF LOUISVILLE, A DIVISION OF NAEGELE, INC.,
1501 Lexington Road,
Louisville, Kentucky 40206 - - - *Plaintiff*

v.

C. MIKE MOULTON, Individually and as an Officer in the Kentucky State Police,
2714 Shiloh Lane,
Louisville, Kentucky 40206 -

AND

DAVID ARMSTRONG, as Commonwealth's Attorney of Jefferson County, Kentucky (30th Judicial District)
6th & Liberty Streets
Louisville, Kentucky 40202

AND

BILLY G. WELLMAN, as Commisioner of the Kentucky State Police,
State Office Building
Frankfort, Kentucky 40601, - - - *Defendants.*

VERIFIED COMPLAINT

Comes the Plaintiff, Naegele, Inc., d/b/a Naegele Outdoor Advertising Co. of Louisville, and for its Complaint against the Defendants herein, states as follows:

THE PARTIES

1. The Plaintiff, Naegele Outdoor Advertising Co. of Louisville, a Division of Naegele, Inc. ("Naegele"), is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in Minnesota. Naegele is engaged in several states, *inter alia,* in the rental of commercial billboard advertising space to local and national commercial advertisers and maintains an office in Louisville, Kentucky at 1501 Lexington Road. It is authorized to transact business in the Commonwealth of Kentucky.

2. The Defendant, C. Mike Moulton ("Moulton"), is an officer and employee of the Kentucky State Police, specifically engaged in investigations of alleged or possible crimes under Kentucky law. Moulton is a citizen and resident of the Commonwealth of Kentucky.

3. The Defendant, David Armstrong ("Armstrong"), is the Commonwealth's Attorney for the 30th Judicial Circuit of the Commonwealth of Kentucky (Jefferson County) and is generally responsible for the investigation and prosecution of alleged violations of Kentucky law in said circuit. Armstrong is a citizen and resident of the Commonwealth of Kentucky. Armstrong is made a Defendant in order that, if he and his office intend to investigate and prosecute Naegele for alleged violations of KRS Chapter 121, said action can be enjoined.

4. The Defendant, Billy G. Wellman ("Wellman"), is Commissioner of the Kentucky State Police. By virtue of said official position he is generally responsible for the administration of said agency and the investigation of alleged crimes in violation of Kentucky law. Wellman is a citizen and resident of the Commonwealth of Kentucky.

JURISDICTION AND VENUE

5. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and 42 U.S.C. § 1983, in that this action arises under the Constitution of the United States and is instituted to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

6. Venue is proper in this District and Division pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1392(a).

COUNT I

7. According to a sworn affidavit executed by Defendant Moulton on November 18, 1983 [Exhibit "A"], on or about September 7, 1983, Moulton and the Kentucky State Police ("KSP") were contacted by one William Tolliver ("Tolliver"), a former employee of Naegele who was dismissed by Naegele on or about May 5, 1983, for engaging in deceptive business practices. According to Defendant Moulton's affidavit, from September 7, 1983, to November 19, 1983, Tolliver provided Moulton and the KSP with information about alleged business practices of Naegele. Moulton stated in his affidavit that on November 17, 1983, Tolliver introduced Moulton and the KSP to a current employee ("the informant") of Naegele, whose identity is presently unknown to Naegele, and the informant then allegedly made charges that Naegele and certain unnamed officers and account executives of Naegele had committed acts which Moulton in his affidavit asserted to be violations of KRS 121.025 and 121.035, which are part of KRS Chapter 121 entitled "Campaign Finance Regulation." From this information the KSP apparently believes that Naegele may have directly or indirectly made technically improper political contributions to the Collins campaign committee in the recent gubernatorial campaign.

8. On the basis of Moulton's affidavit, a search warrant was issued by Hon. Joseph H. Eckert, Judge, First Division, Jefferson Circuit Court, on November 18, 1983, authorizing a search of Naegele's premises and place of business at 1501 Lexington Road, Louisville, Kentucky. A copy of said search warrant is attached hereto as Exhibit "B." Among those types of documents authorized to be seized pursuant to the warrant were:

* * * * * * *

> b) Correspondence documents referring specifically to illegal political activities and fraud committed by Naegele Outdoor Advertising in the course of their regular business activities.
>
> i) Expense vouchers for Naegele Outdoor Advertising officers and account executives for period of January 1, 1980, through November 8, 1983.
>
> j) Any other letters or documents relating to the donations to political campaigns or that relate to campaign fraud as expressed herein and incorporated by reference in Accompanying Affidavit.

In his affidavit, Exhibit "A," ¶¶9 and 10, Moulton asserted that the unidentified informant had advised him that employees of Naegele had contributed funds to the 1983 campaign of Governor-Elect Martha Layne Collins, and that they were to be reimbursed by Naegele for said contributions in similar amounts upon submission by them of expense vouchers.

9. On November 18, 1983, Moulton and approximately four other KSP agents acting pursuant to the state search warrant, along with approximately fourteen agents of the Federal Bureau of Investigation who were acting pursuant to a federal search warrant, converged on Naegele's offices and seized approximately nine bankers' boxes of cor-

porate business documents, including expense voucher files of employees, documents which clearly fell within the attorney-client privilege, and numerous other miscellaneous documents.

10. The copies of both the state and federal search warrants served on Naegele at the time of the search and seizure had no affidavits attached. Although Naegele requested to see the affidavits in support of both the state and federal search warrants, it was advised by officers involved in the search and seizure that the affidavits had been sealed pursuant to court order. Naegele vehemently objected to the seizure of its records and requested that it be permitted to make photo-copies of all seized documents, even offering to furnish Naegele personnel to make the copies under supervision of the KSP and FBI. Said agents refused to agree to Naegele's reasonable request and proceeded to illegally seize and haul away Naegele's current businss records and other documents in violation of the Fourth and Fourteenth Amendments of the United States Constitution. At the time of the seizure to KSP and FBI agreed to make photocopies of the seized documents forthwith and deliver them to Naegele. Although the FBI and delivered some copies, the KSP has failed and refused to furnish copies of any of the seized documents to Naegele, and the FBI and returned copies of only a small percentage of the seized documents. Many of the seized documents are needed by Naegele for the ordinary conduct of its business and Naegele is being irreparably injured by reason of being deprived of either the seized documents or copies thereof.

11. KRS 121.120 and 121.140, along with regulations promulgated thereunder and contained in 801 KAR 2:010, provide the procedure for investigation and determination of whether complaints and allegations of violations of Chapter 121 may be prosecuted by a Commonwealth's At-

torney. Those duties are imposed upon the Registry of Election Finance ("Registry") by said statutes. KRS 121.140 and 801 KAR 2:010 set forth detailed procedures which must be followed by the Registry before a complaint of election law violations can be investigated and prosecuted. Pursuant to KRS 121.140(2), the Registry must first be presented with a complaint; must then determine whether there is probable cause to believe that the law has been violated; and must then hold a due process hearing to determine if a violation has occurred. Under KRS 121.140(3), only if the Registry concludes that there is probable cause to believe that a willful violation has occurred may the matter be investigated and prosecuted by the appropriate local prosecutor.

12. The only prohibitions against citizens contributing to a political campaign in Kentucky are set forth in KRS Chapter 121. The constitutionality of that Chapter has never been determined. The Registry, which was created by the provisions of this Chapter, has investigated and acte in several cases similar to this. It is Naegele's position that as long as Chapter 121 has not been declared unconstitutional and remains in effect, the KSP has no right or authority to bypass the Registry and investigate Naegele or its employees without complying with the provisions of Chapter 121.

13. By undertaking their own prosecutorial investigation after receipt of an alleged complaint of possible election law violations, and conducting a massive search of Naegele's premises and property, Moulton and the KSP have circumvented the statutory requirements of KRS 121.120 and 121.140, as well as 801 KAR 2:010, and, in doing so, have violated Naegele's constitutional and statutory rights, including, but not being limited to, its due process rights under the Fourteenth Amendment of the United States Constitution. By their actions, said De-

fendants have deprived Naegele of its constitutional right to be heard by the Registry prior to the commencement of any investigation and attempted prosecution by Moulton, the KSP, and the Office of the Commonwealth's Attorney.

14. The search conducted by Moulton and the KSP is illegal and violative of Naegele's constitutional and statutory rights, including, but not being limited to, its Fourth Amendment and Fourteenth Amendment due process rights and the provisions of KRS Chapter 121, including, but not being limited to, KRS 121.120, 121.140, and 801 KAR 2:010. Thus, the search was unauthorized and contrary to the specific constitutional and statutory scheme established for obtaining such evidence. KRS 121.120 (3)(j) empowers the Registry to issue subpoenas for the production of documents relevant to its investigation of any complaint of election law violations. 801 KAR 2:010, Section 6(1)(a), also further empowers the Registry to issue subpoenas for the production of relevant documents. Thus, in addition to improperly circumventing express Kentucky statutes and commencing his own investigation of a complaint of election law violations, Moulton and the KSP improperly and without authorization sought and obtained the aforementioned search warrant and illegally seized documents in a manner violative of the established statutory means for obtaining such documents.

15. Since Naegele's rights, as set forth by statute and regulation and guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution, have been, and are continuing to be, violated by Defendants, Naegele is being, and will continue to be, irreparably injured until such time as Defendants are enjoined from proceeding with their improper and illegal investigation and prosecution, and the Registry has had the opportunity to legally investigate the complaint and afford Naegele its full legal rights. In addition to being irreparably injured by being

denied its statutory rights before the Registry, Naegele is also being irreparably injured in its business and property in a presently unascertainable amount as a direct result of media exposure given to the aforestated illegal investigation and search. If said illegal investigation is not immediately enjoined, Naegele will continue to be irreparably injured.

COUNT II

16. Naegele realleges and incorporates by reference each and every allegation contained in the foregoing paragraphs 1 through 15 of this Verified Complaint.

17. Since the enactment of KRS 121.100 to 121.200, it has been the function and practice of the Registry to afford to individuals suspected of violating the Kentucky election laws the opportunity to be heard before the Registry. In spite of assurrances given to Naegele that the affidavit had been sealed pursuant to court order, the state affidavit was instead made available to the news media for publication, prior to Naegele being advised that it was not actually sealed and before Naegele had the opportunity to examine it. Such hearings have been held prior to those allegations being investigated by the appropriate local prosecutor.

18. By illegally and improperly seizing documents from Naegele and commencing an investigation of Naegele and others as a result of the complaint referred to in Moulton's affidavit, Moulton and the KSP have denied, and continue to deny, Naegele its Fourth Amendment rights, and its right to equal protection under the law, as guaranteed by the Fourteenth Amendment. Said Defendants' acts in arbitrarily denying Naegele the due process and other protections afforded by KRS 121.100 to 121.200, and attempting to investigate and potentially prosecute it in a manner substantially different from the manner in which other persons similarly situated have been investigated in

the past amounts to purposeful, intentional and irrational discrimination based upon an arbitrary and unreasonable classification, thus depriving Naegele and its employees of equal protection under the laws as guaranteed by both the United States and Kentucky Constitutions.

19. As a direct result of said acts, Naegele and its employees have been, and continue to be, irreparably and injured, both as a result of the basic deprivation of their Constitutional rights and in Naegele's business and property as a result of widespread publicity generated in part by said illegal search and seizure and other acts taken by the KSP, which publicity would not have occurred except for the illegal and unconstitutional search and seizure. Said irreparable injury to Naegele's business and property in Kentucky and other states, although presently of an unascertainable amount, is substantial and will continue if said illegal investigation of Naegele is not immediately enjoined.

COUNT III

20. Naegele realleges and incorporates by reference each and every allegation contained in the foregoing paragraphs 1 through 19 of this Verified Complaint.

21. All of the aforementioned acts of the Defendants amounting to an infringement of Naegele's constitutional rights have been, and are continuing to be, committed by Defendants acting under the color of state statute, regulation, custom or usage, and are thus violative of 42 U.S.C. §1983.

22. Unless enjoined by this Court, Defendants, by continuation of their wrongful and illegal acts with the intention of depriving Naegele of its statutory rights to first be heard before the Registry with the opportunity to make such defense as Naegele deems appropriate, will continue to interfere with Naegele's right to be heard by the Registry,

to its continued irreparable injury, and will continue to cause Naegele to be irreparably economically injured in its business and property in both Kentucky and other states where it does business by subjecting Naegele to additional potential negative media exposure and criminal prosecution without due process and equal protection of the laws, which exposure and prosecution may be avoided by Naegele at a Registry hearing at which probable cause is found to be lacking.

WHEREFORE, Naegele respectfully demands:

1. That this Court issue a temporary restraining order, preliminary injunction and permanent injunction, enjoining the Defendants, both individually and in their official capacities, and all persons acting in concert or participation with them as follows:

A. From continuing directly or indirectly to conduct any criminal investigation, or to continue or to commence any criminal prosecution, of Naegele and any of its employees for any violation of the provisions of Chapter 121 of the Kentucky Revised Statutes until such time as a sworn complaint alleging such violation(s) shall be made to the Kentucky Registry of Election Finance, and Naegele and any of its employees so complained against have been afforded their full and complete procedural due process rights as set forth in KRS 121.100 to 121.200 and 801 KAR 2:010, and the Registry shall have made a conclusion of probable cause that the law has been willfully violated and shall refer such alleged violation for investigation and prosecution in the manner prescribed in Chapter 121.

B. From continuing to withhold from Naegele the documents, and copies thereof, seized pursuant to the November 18, 1983, search of Naegele's premises which relate to alleged potential violations of KRS Chapter 121, including, but not being limited to, those items seized pur-

suant to items b), i), and j) listed on the November 18, 1983, search warrant, Exhibit "B" hereto. Defendants should be ordered to immediately return to Naegele all documents seized from it and referred to above, along with any and all copies thereof and be prohibited from using information obtained thereby for the purposes of any investigation.

2. That Naegele be granted judgment for its costs herein expended and a reasonable attorney's fee as provided in 42 U.S.C. §1988.

3. That Naegele have all other relief to which it may be entitled.

Wyatt, Tarrant & Combs

(s) Bert T. Combs
Bert T. Combs

(s) Charles R. Simons
Charles R. Simons

(s) M. Stephen Pitt
M. Stephen Pitt
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel for Plaintiff

VERIFICATION

Affiant, Sara Walter, states she has read the foregoing Verified Complaint and that it is true and accurate to the best of her belief.

(s) Sara Walter
Sara Walter
Vice President and General Counsel for Naegele Outdoor Advertising Company of Louisville, a Division of Naegele, Inc.

Subscribed and sworn to before me by Sara Walter this 30th day of November, 1983.

My Commission expires: March 20, 1984

(s) Linda M. Hoehler
Notary Public, State-at-Large, Kentucky

JEFFERSON CIRCUIT COURT

COUNTY OF JEFFERSON

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

AFFIDAVIT IN SUPPORT OF AND PETITION FOR SEARCH WARRANT

Comes the affiant, Lt. C. Mike Moulton, who personally appeared before the undersigned, and being first duly sworn now on oath deposes, affirms and says that he has and there is reasonable and probable grounds to believe and affiant does believe that there is now on the premises known as Naegele Outdoor Advertising of Louisville, Inc., more particularly described as follows: 1501 Lexington Road, located on the north-east corner of Lexington Road; (said building is a two story structure, the first story being red brick and the second story being brown stained wood. The structure also has a basement and an attached garage and storage area of off-white colored metal siding. Said premises is located at the intersection of Spring Street and is bounded on the north side by Quarry Street, which dead ends immediately behind said premises and said premises is located in Louisville, Jefferson County, Kentucky,) and on the persons on said premises and outbuildings on said property, for the property described as follows, to-wit:

A quantity of documents, including but not limited to the following:

a) Poster display contracts
b) Correspondence documents referring specifically to illegal political activities and fraud committed by

Naegele Outdoor Advertising in the course of their regular business activities

c) Location lists

d) Visi record scheduling cards

e) Spread sheet ledger

f) Billing books

g) Invoices

h) Posting lists

i) Expense vouchers for Naegele Outdoor Advertising officers and account executives for period of January 1, 1980—November 8, 1983.

j) Any other letters or documents relating to the donations to political campaigns or that relate to campaign fraud as expressed herein and incorporated by reference in Accompanying Affidavit

Which are possessed for the purpose of violation of the laws of the Commonwealth of Kentucky.

1. The affiant says that he is a Kentucky State Police Officer and that the information and observations contained herein were received and made in his capacity as such: that he has viewed the premises and that they are as described. The affiant states that on or about September 7, 1983, he was personally contacted at his office in Louisville by William Tolliver who stated that he had information and documents relating to illegal activities conducted by Naegele Outdoor Advertising.

2. Since the time of the first meeting and the present date, the affiant personally met with William Tolliver on several occasions, the most recent being November 17, 1983, and has talked to him by telephone on numerous other occasions. At these meetings, various illegal activities of Naegele Outdoor Advertising were discussed and copies of documents and records were given to the affiant for his

examination and review. William Tolliver advised that he had been employed by Naegele Outdoor Advertising for approximately two years between the first part of 1981 and the first part of 1983. This information was verified by a person known to be a present employee of Naegele Outdoor Advertising.

3. William Tolliver advised the affiant that during his two year period of employment, he was fully aware of and participated in a number of criminal activities, including among other things, a scheme to defraud customers of Naegele Outdoor Advertising. It is known to affiant by independent investigation that Naegele Outdoor Advertising is an outdoor advertising company which, among other things, rents, leases or otherwise contracts space on billboards in Kentucky for advertising purposes for customers located in Kentucky and elsewhere. According to William Tolliver, the scheme to defraud included, among other things, overselling of billboard space, renting/leasing the same space for the same period of time to two or more customers, and representations of exposure to the consuming public of advertising greater than actual exposure. In furtherance of the scheme to defraud, numerous mailings, interstate telephone communications, personal contacts, and other activities occurred. William Tolliver personally observed employees of Naegele Outdoor Advertising involved in acts in furtherance of the aforesaid scheme to defraud and personally participated in same.

4. On November 4, 1983, William Tolliver provided affiant with example copies of documents which corroborated his representations regarding the scheme. The documents and records were personally examined by affiant and clearly indicate that more than one customer was scheduled for the use of the same billboard during the same period of time. William Tolliver advised that Naegele Outdoor Advertising has numerous contracts and financial documents

and records which show payment by two or more customers for the same billboard space at same time. William Tolliver represented that during his period of employment, Naegele Outdoor Advertising had oversold (or double sold) as much as 40% of its billboard space during certain time periods. This is in violation of KRS 514.040.

5. William Tolliver stated to affiant that he was a market scheduler and responsible for coordinating available space. In this position, he personally knew of and participated in the practices described above. As market scheduler, he is completely familiar with those documents generated and maintained relative to the outdoor advertising business as operated by Naegele Outdoor Advertising.

6. William Tolliver stated to affiant that Naegele Outdoor Advertising of Louisville, Inc. has approximately 100 customers at any point in time. Approximately 10-15 of these customers are "National Accounts" with offices outside of Louisville, Kentucky, and these customers are most often victim of the scheme to defraud. Only about 25-30% of the remaining customers are victims. National Account customers are not in a position to observe sign locations contracted for, leased, or rented without effort and generally only send representatives to examine billboards on a scheduled basis. All activities of this type are controlled and coordinated out of the Louisville office of Naegele Outdoor Advertising.

7. On November 4, 1983 and November 17, 1983, William Tolliver advised affiant that it would be necessary to obtain documents and record evidence from Naegele Outdoor Advertising by search warrant execution in that, based on William Tolliver's conversations with and knowledge pertaining to employees of Naegele Outdoor Advertising, efforts would be made to destroy, alter or otherwise impede examination of any documents or records sought by other means. William Tolliver advised that he is per-

sonally acquainted with and has discussed matters relating to the scheme to defraud with Don Windhorst - President, Wayne Lamm - Vice-President/National Sales, Rod Morris-Senior Account Executive, and the several Account Executives—all of whom have knowledge of and participated in the schemes to defraud. William Tolliver advises the scheme to defraud is known to him from his conversations to have been ongoing since at least January 1, 1980.

8. On November 17, 1983, William Tolliver stated to affiant that the documents incorporated by reference herein do, in fact, exist at the locations specified. This specific information has been corroborated by conversations with affiant within the last week with a person known to affiant to be a current employee of Naegele Outdoor Advertising. Said present employee of Naegele Outdoor Advertising has personally observed many of the records described and incorporated by reference herein and advised that they exist in the locations identified to affiant by William Tolliver, thus corroborating representations made to affiant by the source.

9. On November 17, 1983, affiant was introduced to another reliable source. The identity of said source, who was then and is now, an employee of Naegele Outdoor Advertising shall remain confidential at this time. This source's reliability is corroborated by information supplied by William Tolliver in addition to an independent investigation done by affiant concerning review of said documents referred to by both William Tolliver and said confidential informant. This source explained to affiant that officers of Naegele Advertising were soliciting campaign contributions for Martha Layne Collins, gubernatorial candidate, from employees of Naegele Outdoor Advertising. The reliable confidential source stated that officers and account executives were directed to contribute $200.00 each with personal checks. It was explained to the employees that they

would be reimbursed for their contributions if they submitted expense vouchers to offset their contribution. This is in violation of KRS 121.025 and 121.035.

10. On November 17, 1983, the reliable confidential source explained to affiant that copies of vouchers submitted by employees to offset their $200.00 contributions would be maintained by Sandy Dearen in the accounting office located on the first floor (ground level).

11. Copies of notes made by this second source detailing conversation said source was involved in and/or overheard about illegal campaign contribution have been turned over to affiant and are in affiant's possession. These notes made by the source described numerous instances of conversation among various individuals. These conversations depict requests for donations to the Collins and other campaigns made by company executives to rank and file employees. These requests were followed by assurances of payback to the employees by Naegele Outdoor Advertising on their expense accounts. This is in violation of KRS 121.025 and 121.035.

The Affiant has reasonable and probable grounds to believe that grounds now exist for the issuance of a search warrant based on the aforesaid facts, information and circumstances and prays that a search warrant be issued and the premises mentioned herein and the persons, vehicles and any outbuildings on said premises who are connected with be searched in their entirety and that any of the personal property described herein or contraband possessed for the purpose of violation of the laws of the Commonweath of Kentucky be seized and brought before the court and retained subject to order of said court.

(s) Lt. C. Mike Moulton

Subscribed and sworn to before me this November 18, 1983 at 11:49 A.M., by C. Mike Moulton, who says that he had read the foregoing Affidavit in Support of and Petition for a search warrant and that the statements contained herein are true.

(s) Joseph H. Eckert

Judge, Court
Jefferson Circuit Court 1st Division
Louisville, Kentucky

Filed in office and warrant issued this November 18, 1983

(s) Joseph H. Eckert
Judge, Court
Jefferson Circuit Court 1st Division

Executed on Sara Walters, general counsel for Naegele Outdoor Advertising, on Friday Nov. 18, 1983 at 2:30 P.M.

(s) C. Mike Moulton

Attached lists of property was seized by the State Police and in their possession.

Also attached is a copy of lists made by the F.B.I. The F.B.I. also served a search warrant and the items they seized were kept in their possession, however this warrant entitled me to those listed items and I will receive a copy of them from the F.B.I.

(s) C. Mike Moulton

IN THE

JEFFERSON CIRCUIT COURT

OF JEFFERSON COUNTY, KENTUCKY

SEARCH WARRANT

To any Policeman, Sheriff, Constable, or Peace Officer of the Commonwealth of Kentueky:

Proof by Affidavit having been this day made by Lt. C. Mike Moulton, that there is probable and reasonable grounds for the issuance of this Search Warrant as set forth in the Affidavit attached hereto and made a part of this Search Warrant as if fully set out herein: You are commanded to make immediate search of the premises known as the Naegele Outdoor Advertising of Louisville, Inc., more particularly described as follows: 1501 Lexington Road, located on the north-east corner of Lexington Road; (said building is a two story structure, the first story being red brick and the second story being brown stained wood. The structure also has a basement and an attached garage and storage area of off-white colored metal siding. Said premises is located at the intersection of Spring Street and is bounded on the north side by Quarry Street, which dead ends immediately behind said premises and said premises is located in Louisville, Jefferson County, Kentucky,)
And on the persons on said premises and outbuildings on said premises or property for the following described personal property, to-wit:

A Quantity of Documents, including but not limited to the following:

a) Poster display contracts

b) Correspondence documents referring specifically to illegal political activities and fraud committed by Naegele Outdoor Advertising in the course of their regular business activities

c) Location lists

d) Visi record scheduling cards

e) Spread sheet ledger

f) Billing books

g) Invoices

h) Posting lists

i) Expense vouchers for Naegele Outdoor Advertising officers and account executives for period of January 1, 1980—November 8, 1983.

j) Any other letters or documents relating to the donations to political campaigns or that relate to campaign fraud as expressed herein and incorporated by reference in Accompanying Affidavit.

Which are possessed for the purpose of violation of the laws of the Commonwealth of Kentucky.

And if you find same, or any part thereof, to bring it forthwith before me.

Witness my hand this 18th day of November, 1983.

(s) Joseph H. Eckert

Judge, Court
Jefferson Circuit Court
1st Division

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

No. C 79-0157-P(B)

CARROLL HUBBARD FOR GOVERNOR COMMITTEE, et al. - - - - - - *Plaintiffs*

v.

KENTUCKY REGISTRY OF ELECTION FINANCE, et al. - - - - - - *Defendants*

MEMORANDUM

This matter is before the Court on the motion of the plaintiffs for summary judgment. By their motion plaintiffs seek to have the Court enjoin the Kentucky Registry of Election Finance (Registry), its individual members, the Commonwealth's Attorneys of Graves and Breathitt Counties and the Attorney General of Kentucky "from referring and/or prosecuting any civil or criminal action against plaintiffs arising out of any act complained of in this matter" and further to require the Registry officially to give notice to plaintiffs of alleged violations of the Campaign Finance Regulation Act, Chapter 121 KRS. Plaintiffs would also require defendants to permit plaintiffs to furnish names of contributors to the Registry or, alternatively, to permit plaintiffs to return the questioned contributions to the contributors.

The factual background of this action may be found in *Carroll Hubbard for Governor Committee* v. *Kentucky Registry of Election Finance*, 477 F. Supp. 184 (W.D. Ky.

1979), and that background will not be set forth at length here. This Court's ruling denying injunctive relief to plaintiffs was reversed in an unpublished order by the United States Court of Appeals for the Sixth Circuit. We believe that the pertinent language of that order is as follows:

> "The second more difficult question to be decided is whether *Younger* [v. *Harris*, 401 U. S. 37, 91 S. Ct. 746 (1971)] abstention prohibits a federal court's preliminarily enjoining the Attorney General or Commonwealth(sic) Attorneys from initiating a criminal proceeding. The relevant inquiry is whether a 'state prosecution' was pending at the time the federal district court heard oral argument on the preliminary injunction.
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> * * * *
>
> In this case, the Registry found reasonable grounds to believe that the Committee had violated the Act. The Registry referred its investigation of the Committee to the Attorney General and Commonwealth(sic) Attorneys for further action. Pursuant to directions from the Commonwealth(sic) Attorney for Graves County, a subpoena was issued for return prior to the September 4, 1979 meeting of the Graves County Grand Jury. At the time of the district court's action in this case, no evidence had been presented to the Grand Jury. Assuming, *arguendo* that state court criminal litigation in this case had ripened, (citation omitted); we hold that *Younger* abstention principles did not prohibit federal intervention. Federal abstention is not appropriate when plaintiffs do not have the opportunity to present their federal claims in the ongoing state proceedings. (Citations omitted.) In this case plaintiffs have alleged due process violations in the Registry's proceedings . (Footnote omitted.) The legality of the

> Registry's proceeding without notice and hearing to the Committee cannot be raised in defense of the arguably pending criminal prosecution."

We read the quoted language as mandating a determination by this Court whether the actions of the Registry in proceeding without notice and hearing deprived plaintiffs of due process.[1]

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[1]Apparently, the General Assembly of Kentucky recognized the potential constitutional questions posed by KRS 121.140 which in 1979 provided in part: "The registry itself, if it has reasonable grounds to believe that a violation of this chapter has occurred shall initiate action and notify the attorney general or the appropriate commonwealth's attorney of the suspected violation." In 1980, the Legislature amended Section 140 to provide in part: "(1) Upon the sworn complaint of any person, or on its own initiative, the registry shall investigate alleged violations of this law. Not later than five (5) days after the registry receives a sworn complaint, or after it decides to investigate on its own initiative, it shall give notice of the investigation to the person complained against. The person complained against shall be given five (5) days from receipt of notice of the investigation in which to respond to the complaint of alleged violations of this law. Not later than five (5) days after receipt of a response from the person complained against, the registry shall:

(a) Acknowledge receipt of the complaint to the complainant, where appropriate;

(b) Acknowledge receipts(sic) of the response from the person complained against; and

(c) Notify, in writing, the person who made the complaint and the person complained against of what action, if any, the registry has taken or plans to take on the complaint together with the reasons for such action or nonaction. If the registry does not decide within five (5) days of receipt of the response what action to take, it shall notify the person who made the complaint of the reasons for the delay and shall subsequently give him the appropriate notification."

Plaintiffs argue that in other instances of alleged violations of the Act the Registry has afforded opportunity to those against whom complaints have been lodged to be heard and to take remedial action such as refunding unlawful contributions. Plaintiffs further argue that they were denied the opportunity to correct any unlawful activity charged or to controvert any charge against them. This denial, plaintiffs assert, amounts to a denial of equal protection.

Defendants counter this assertion by pointing out that none of the instances cited by plaintiffs involved a *sua sponte* charge by the Registry.

We turn to a consideration of the positions adopted by the parties.

Plaintiffs' argument amounts to an assertion of disparate treatment. They cite the ancient teaching of *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1067 (1886), and numerous later cases that unequal and arbitrary enforcement of laws cannot be tolerated. We have no quarrel with this basic principle. Our problem stems from the fact that we have no evidence before us from which we can conclude that the Act has been arbitrarily enforced against plaintiffs. We have conclusory assertions to this effect but no more.

We must nevertheless comply with the mandate of the Court of Appeals and we read the order as directing this Court to enjoin any further proceedings by the Registry until plaintiffs have been afforded a due process hearing.

The individual plaintiffs are political creatures. As we have previously noted, the political facts of life establish beyond cavil that, the presumption of innocence to the contrary notwithstanding, indictment of a political office holder or candidate is not calculated to confer a benefit on the target of the indictment. This conclusion, we believe, satisfies the criterion of showing irreparable harm justify-

ing injunctive relief. *Mason County Medical Association* v. *Knebel,* 563 F. 2d 256 (6th Cir. 1977).

Having concluded that plaintiffs are entitled to notice of the charges and to a hearing before any criminal or civil proceedings are instituted by defendants or any of them, we turn next to the additional relief sought by plaintiffs.

Plaintiffs would have us order that in the event a violation is found they be allowed to provide the names of the violating contributors to the Registry or, alternatively, plaintiffs be allowed to refund the amounts contributed in violation of the statute.

To grant this relief would amount to judicial legislation. The statute provides in pertinent part: "When the registry determines that the preponderance of the evidence shows a violation has occurred, it shall issue an order to the violator to comply with any one or more of the following requirements: (a) To cease and desist violation of this law. . . ." KRS 124.140(2)(a).[2]

We believe that the remedy which plaintiffs seek to have us fashion is more appropriately left to the legislative processes of the Commonwealth and the relief sought will be denied.

One further matter needs to be addressed. Plaintiffs argue, without suggesting a solution, that the Registry as presently constituted will not afford them a fair hearing. They suggest that the Executive Director, the Chairman of the Registry and the General Counsel of the Registry are the same individuals who instituted the original proceedings and will form the tribunal which will conduct the hearing which this Court has ordered. Laying aside the fact that the Executive Director and the General Counsel are not members of the Registry, KRS 121.110 and 121.120, we have nothing but the conclusory assertion of bias made by

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[2]Other requirements for compliance are inapplicable.

counsel for plaintiffs. In the absence of evidence of bias we conclude that the argument of plaintiffs is without merit.[3]

An appropriate order has been entered this date.

December 23, 1982

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record
Entered: December 30, 1982

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[3]Neither of the two Commonwealth's Attorneys named as defendants presently holds that office. The Attorney General named as defendant is now Chief Justice of the Supreme Court of Kentucky.

KENTUCKY REVISED STATUTES

121.025. — Corporate contributions to candidates prohibited. — No corporation, and no officer or agent of a corporation on its behalf, shall contribute, either directly or indirectly, any money, service or other thing of value towards the nomination or election of any state, county, city or district officer, or pay, promise, loan or become liable in any way for any money or other valuable thing on behalf of any candidate for office at any election, primary or nominating convention held in this state. No attorney or other person shall accept employment and compensation from a corporation with the understanding or agreement, either direct or implied, that he will contribute to any such candidate, or on his behalf, any part or all of such compensation, towards the nomination or election of such candidate. (Enact. Acts 1974, ch. 130, § 179; 1984, ch. 111, § 66, effective July 13, 1984.)

121.035. Corporate contributions to aid candidates for public office prohibited — Aid to support a public issue permitted. — (1) No corporation organized or authorized to do business in this state shall, by itself or by or through an officer, agent, attorney or employe, subscribe, give, procure or furnish, or afterwards reimburse or compensate in any way any person who has subscribed, given, procured or furnished, any money, privilege, favor or other thing of value to any political or quasi-political organization, or any officer or member thereof, to be used by such organization for the purpose of aiding, assisting or advancing any candidate for public office in any way whatever.

(2) No officer, agent, attorney or employe of any corporation organized or authorized to do business in this state, or person acting for or representing any such corporation, shall disburse, distribute, pay out or in any way handle any money, funds or other thing of value that

belongs to or has been or is being furnished by any such corporation or any officer, agent, attorney or employe thereof to be used or employed in any way for the purpose of aiding, assisting or advancing any candidate for public office in any way whatever.

(3) Nothing in this section shall be construed to prohibit a corporation from making contributions in support of a position on an issue of public importance. (Enact. Acts 1974, ch. 130, § 179; 1980, ch. 292, § 2, effective July 15, 1980.)

121.140(2).

(2) When the registry concludes that there is probable cause to believe that the law has been violated, it may hold a hearing to determine if such violation has occurred. If a hearing is held, the person complained against may choose whether the hearing shall be open or closed. At the hearing, the person complained against shall have all of the protections of due process, including but not limited to the right to be represented by counsel, the right to call and examine witnesses, the right to the production of evidence by subpoena, the right to introduce exhibits and the right to cross-examine opposing witnesses. When the registry determines that the preponderance of the evidence shows a violation has occurred, it shall issue an order to the violator to comply with any one or more of the following requirements:

(a) To cease and desist violation of this law;

(b) To file any reports or other documents or information required by this law; or

(c) To pay a penalty not to exceed one hundred dollars ($100) a day for failure to file any report or other document or information required by law until such report, document or information is filed.

121.990. Penalties. — (1) Any public service corporation engaged in business in this state, or any officer or agent of such corporation, or attorney or other person employed by such corporation, who wilfully violates any of the provisions of KRS 121.025, shall be fined not more than ten thousand dollars ($10,000), and, in the case of individuals, be imprisoned in the county jail for not less than thirty (30) days nor more than one (1) year.

(2) Any corporation other than a public service corporation, of any officer or agent of such a corporation, or attorney or other person employed by such a corporation, who wilfully violates any of the provisions of KRS 121.025 with respect to the nomination or election of any state, county, city or district officer who, in his official capacity, is required by law to perform any duties peculiar to such corporation not common to the general public, or to supervise, regulate or control in any manner the affairs of such corporation, or to perform any duty in assessing the property of such corporation for taxes, shall be fined not more than ten thousand dollars ($10,000), and, in the case of individuals, be imprisoned in the county jail for not less than thirty (30) days nor more than one (1) year.

(3) Any corporation other than a public service corporation, or any offiicer or agent of such a corporation, or attorney or other person employed by such a corporation, who wilfully violates any of the provisions of KRS 121.025 with respect to the nomination or election of any candidate other than those mentioned in subsection (2) of this section, shall be fined not more than one thousand dollars ($1,000), and, in the case of individual, be imprisoned in the county jail for not more than one (1) year.

(4) Any attorney who wilfully violates any of the provisions of KRS 121.025 or 121.045 shall, in addition to the penalties prescribed in subsections (1), (2), (3) and (7) of

this section, be disbarred from the practice of law in this state, and the judgment of conviction shall so declare.

(5) Any corporation that wilfully violates any of the provisions of subsection (1) of KRS 121.035 shall be fined not less than five hundred dollars ($500) nor more than five thousand dolars ($5,000) for each offense, and upon conviction its charter shall be forfeited or its authority to do business revoked.

(6) Any person who wilfully violates any of the provisions of subsection (2) of KRS 121.035 shall, for each offense, be fined not less than two hundred and fifty dollars ($250) nor more than one thousand dollars ($1,000), and imprisoned in the county jail for not less than (3) months nor more than one (1) year.

(7) Any person who wilfully violates any of the provisions of KRS 121.045 shall be fined not more than ten thousand dollars ($10,000), and imprisoned in the county jail for not less than thirty (30) days nor more than one (1) year.

(8) Any person who wilfully violates any of the provisions of KRS 121.055 shall be fined not more than five thousand dollars ($5,000), or imprisoned in the county jail for not more than six (6) months, or both.

(9) Any person who wilfully violates any provisions of KRS 121.100 to 121.200 shall be punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment for not more than one (1) year, or both. Violations shall include but shall not be limited to any of the following acts or omissions:

(a) Failure to make required reports or to file reports at times specified;

(b) Making any false statement or reports;

(c) Giving money under a fictitious name;

(d) Making any communication to support or defeat a candidate without identification of sponsorship.

(10) The nomination for, or election to, an office of any candidate who wilfully violates any provision of KRS 121.100 to 121.200, or whose campaign treasurer wilfully violates any provision of KRS 121.100 to 121.200, with such candidate's knowledge, shall be void, and the office or candidacy shall be filled as provided by law for the filling of a vacancy. An action to declare a vacancy under this subsection may be brought by the registry, the attorney general, or any candidate for the office sought to be declared vacant, or any qualified voter.

(11) The attorney general, commonwealth's attorney, the registry, or any qualified voter may sue for injunctive relief to compel compliance with the provisions of KRS 121.100 to 121.200.

(12) The commonwealth' attorney for the county in which the candidate resides shall be the chief prosecutor upon receipt of a written request from the registry, shall prosecute any violator under this chapter, and in the event he fails or refuses to prosecute a violator, upon written request from the registry, the attorney general shall appoint a special prosecutor with full authority to carry out the provisions of this section.

(13) Prosecution for violation of any provision of KRS 121.100 to 121.200, shall not be commenced after four (4) years have elapsed from the date of the violation. In the event the violator is an officeholder, the statute of limitations shall not run until one (1) year following expiration of his current term of office.

(14) Any person who wilfully violates any of the provisions of subsection (1) of KRS 121.310 shall be fined not less than one thousand dollars ($1,000) nor more than

five thousand dollars ($5,000), or imprisoned in the county jail for not more than six (6) months, or both.

(15) Any corporation that wilfully violates any of the provisions of subsection (2) of KRS 121.310 shall be fined not less than five hundred dollars ($500) nor more than five thousand dollars ($5,000) for each offense, and upon conviction its charter shall be forfeited or its authority to do business revoked.

(16) Any person who wilfully violates any of the provisions of KRS 121.320 shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500), or imprisoned in the county jail for not less than ten (10) days nor more than thirty (30) days, or both. (Enact. Acts 1974, ch. 130, §§ 195, 196; 1980, ch. 292 § 12, effective July 15, 1980.)

BURNS INDIANA STATUTES ANNOTATED 3-4-3-3

Corporation and union contributions.—(a) Notwithstanding IC 23-1-2-17, IC 23-3-8-1, IC 28-2-4-1, or any other state law, a corporation or labor organization may make a political contribution to aid in the election or defeat of a candidate or to aid in the success or defeat of a political party, principle, measure, or proposition submitted to a vote in an election; however, during any calendar year, no corporation or labor organization may make total political contributions in excess of:

(1) An aggregate of five thousand dollars ($5,000) on behalf of and apportioned in any manner along all candidates for offices for which all of the voters of the state may vote;

(2) An aggregate of five thousand dollars ($5,000) apportioned in any manner among all state central committees of political parties;

(3) An aggregate of two thousand dollars ($2,000) on behalf of and apportioned in any manner among all candidates for all offices for which fewer than all of the voters of the state may vote; and

(4) An aggregate of two thousand dollars ($2,000) apportioned in any manner among all political party committees other than state central committes.

(b) A contribution to any political committee by a corporation or labor organization, which is designated by that corporation or labor organization for disbursement to a specific candidate or political party committee, is subject to the limitations in subsection (a).

(c) Contributions by a corporation or labor organization are limited to those authorized by this section.

(d) This section does not apply to nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and employees, or by a trade association or labor organization aimed at its members. (IC 3-4-3-3, as added by Acts 1976, P.L. 6, § 1, 1981, P. L. 19, § 2; P.L. 17-1983, § 1.)